83-1921

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE TRANE COMPANY AND MAURICE BOUCHARD,
Petitioners,

v.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316
Attorneys for Petitioners

May 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Is speech properly classified as "commercial speech" solely because it is economically motivated and relates to the speaker's business?

2. May speech be entirely suppressed on the sole grounds that it is allegedly "repugnant to American values and traditions," even though the United States requires precisely such speech from those seeking to do business with this country, and that it implicates "delicate foreign policy questions," even though no such questions have been identified and no connection has been shown between any such questions and the challenged suppression of speech?[1]

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[1] The petitioners are The Trane Company ("Trane") and Trane's Vice President Maurice Bouchard. United Technologies Corporation ("UTC") and UTC's Vice President Nicholas Tomassetti were intervening plaintiffs and appellants below but are not petitioners here. In addition to Malcolm Baldrige, the respondents are Lionel H. Olmer, Under Secretary for International Trade of the United States Department of Commerce, William French Smith, Attorney General of the United States, and Ronald Reagan, President of the United States.

Trane's parent company is American Standard Inc. UTC has no parent. Neither Trane nor UTC has subsidiaries whose shares are publicly traded on stock exchanges in the United States.

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United States Department of Commerce, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Trane Company ("Trane") and Maurice Bouchard respectfully pray that a writ of certiorari issue to review the judgment and decision entered by the United States Court of Appeals for the Seventh Circuit on February 24, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 728 F.2d 915 (7th Cir. 1984). A copy of the opinion appears as Appendix A and of the judgment as Appendix E. It affirmed decisions entered in this case by the United States District Court for the Western District of Wisconsin, reported at 552 F. Supp. 1378 and reprinted as Appendix B, and in *Briggs & Stratton Corp* v. *Baldrige* by the United States District Court for the Eastern District of Wisconsin, reported at

539 F. Supp. 1307 and reprinted as Appendix C. The order and decision of the United States District Court for the Eastern District of Wisconsin denying the motion of the *Briggs & Stratton* plaintiffs for reconsideration, reported at 544 F. Supp. 667, is reprinted as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech. . . ." Pertinent provisions of the Export Administration Act of 1979, 50 U.S.C. App. § 2401 *et seq.*, appear as Appendix G.[2]

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[2] Though the Export Administration Act of 1979 ("EAA") has lapsed, its prohibitions are still in force by virtue of Executive Order.

The EAA lapsed on March 30, 1984. *See* Pub. L. No. 98-222, 98 Stat. 36 (1984). On that date, the President declared a national economic emergency, and pursuant to Section 203 of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1702 (Supp. V 1981), and 22 U.S.C. § 287c (1982), promulgated the EAA and the Export Administration Regulations ("EAR") by Executive Order. *See* Exec. Order No. 12470, 49 Fed. Reg. 13099 (1984). The penalties for violating the Executive Order are those authorized by IEEPA, which vary somewhat from those authorized by the EAA. *Cf.* 50 U.S.C. § 1705 (Supp. V 1981) *with* 50 U.S.C. App. § 2410 (Supp. V 1981).

Both Houses of Congress have passed versions of a bill amending and extending the EAA. See S. 979, 98th Cong., 2d Sess., 130 Cong. Rec. S2252 (daily ed. March 2, 1984) (Senate); S. 979, 98th Cong., 2d Sess., 130 Cong. Rec. H1415 (daily ed. March 8, 1984) (House). Neither version alters the anti-boycott provisions of the EAA in any way. The two versions are now before the Conference Committee.

Pertinent provisions of the Export Administration Regulations, 15 C.F.R. Part 369, appear as Appendix H.

STATEMENT OF THE CASE

Petitioners' complaint seeks a declaratory judgment that certain provisions of the Export Administration Act of 1979 ("EAA") and the Export Administration Regulations ("EAR"), which prohibit the communication of truthful business information in response to questionnaires related to certain boycotts, violate the First, Fifth and Ninth Amendments to the United States Constitution. The EAA makes such a response by any United States person a criminal offense.

Factual Background[3]

The 21-member League of Arab States ("Arab League") has conducted a boycott of Israel since 1954. Sixteen Arab states refuse to trade, and prohibit their residents from trading, with Israel or in Israeli goods. Thirteen also prohibit such trade with persons or firms which, though not residents of Israel, have been blacklisted for engaging in activities proscribed by the boycott. It is undisputed that the Arab boycott violates neither the law of the United States nor international law.

Not all trade or relations with Israel lead to blacklisting. Only certain kinds of trade or relations are prohibited, and an American company may trade extensively with Israel and still avoid blacklisting. To do so, however, an American firm must respond if it receives questionnaires from the Central Boycott Office ("CBO") of the Arab League or the boycott offices of individual Arab

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[3] This Section is drawn from the Stipulation of Facts entered into by all parties to this action, which is reprinted as Appendix F.

countries regarding its business with Israel or with blacklisted firms.

The CBO and the national boycott offices gather boycott-related information, and any of them may commence an action to blacklist a firm. Reportedly, the investigation may be prompted by a competitor's charges, whether or not they are true, that a firm is in violation of boycott principles. In the course of the investigation, a boycott office may send a questionnaire to the target firm inquiring about its business affiliations, its relationship with Israel or with blacklisted persons or firms, or other matters.

The Arab League Council's "General Principles for Boycott of Israel" ("General Principles") provide the standards by which the CBO and the local boycott offices are to make blacklist decisions. Although they have not always applied the standards uniformly, the participating Arab states have announced that their blacklist activities are governed by the General Principles. One of the General Principles provides that a company may be blacklisted if it fails to respond to inquiries concerning its relationship with Israel. As a practical matter, failure to respond to a questionnaire makes it probable that the target firm will be blacklisted by the country from which the questionnaire originated. Stipulation of Facts ("Stip.") ¶¶ 12, 28, Appendix ("App.") at 59a-60a, 64a. More likely than not, the boycott office will also then propose that the CBO recommend that the target firm be blacklisted in other Arab states as well. Stip. ¶ 12, App. at 59a-60a. Once the target firm is referred to the CBO, it is reasonably likely that a recommendation for blacklisting will ensue, and it is probable that the target firm, together with its subsidiaries and affiliates, will be blacklisted in at least some of the other participating Arab countries. Stip. ¶ 13, App. at 60a.

In 1978, Trane received a questionnaire from the Kuwaiti boycott office seeking information about the company's ownership and its activities in and its relationship with Israel and Israeli firms, as well as with certain specifically named companies.[4] The company was directed to reply to the questionnaire within three months, but was subsequently granted extensions of time. Trane believes that if it were permitted to answer the questionnaire it would not be blacklisted.

The EAA authorizes regulations which prohibit certain boycott-related actions, including responses to questionnaires. *See* 50 U.S.C. App. § 2407(a)(1) (Supp. V 1981), App. at 71a. Such actions are prohibited if they are taken with the "intent to comply with, further, or support" an unsanctioned foreign boycott. *Id.* The EAR deem the requisite intent to exist where information is furnished with the knowledge that it is sought for boycott purposes. *See* 15 C.F.R. § 369.2(d)(4) (1983), App. at 81a. The EAA prescribes civil and criminal penalties for such responses, including fines, imprisonment, and the suspension or revocation of the company's authority to export. *See* 50 U.S.C. App. § 2410 (Supp. V 1981), App. at 76a. The fact that some of the information requested by a questionnaire is publicly available from a number of sources, as it is in this case, is no defense to a charge under the EAA. *See* 15 C.F.R. § 369.2(d)(4) (1983), App. at 81a.

Trane has been informed by boycott officials that action will be taken against the company if it does not answer the questionnaire. Stip. ¶ 29, App. at 64a. The company will be seriously harmed if it is blacklisted. Trane manufactures and exports more than $15 million worth of goods

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[4] A copy of the Kuwaiti questionnaire appears as Appendix I.

annually to Arab League members and thereby provides employment to more than 100 individuals. The company has substantial investment in the Arab states in connection with its business there. It is actively engaged in increasing its sales to Arab countries and has good prospects of doing so unless it is blacklisted.

The individual petitioner is a vice president of Trane. He would respond to the Kuwaiti questionnaire in the ordinary course of business, and he believes that Trane's blacklisting may cause his present position to be eliminated or downgraded and his income and opportunities for employment or advancement to be diminished.

The Decisions Below

The District Court granted the defendants' motion for summary judgment.[5] The court held that plaintiffs' sole interest in responding to the questionnaire is economic and that their speech should therefore be classified as "commercial speech". App. at 16a. The court further held that the United States has an interest in preventing American citizens from participating in actions which are "repugnant to American values and traditions." App. at 18a. On that basis the District Court decided that the prohibition against responding to the questionnaire advances a substantial governmental interest and is therefore permissible.

The Court of Appeals affirmed, adopting the reasoning of the District Court in the *Briggs & Stratton* case, in which the same provisions were challenged and which had

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[5] The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 (general federal-question jurisdiction), 2201 and 2202 (jurisdiction for declaratory judgment and further relief).

been consolidated with this case for argument. In the *Briggs & Stratton* opinion, the District Court assumed that responses to boycott-related questionnaires constitute commercial speech and, on the basis of the "delicate foreign policy questions" allegedly involved and the government's alleged interest in preventing American citizens from participating in actions "repugnant to American values and traditions," held that the government has the power to prohibit them. App. at 47a-48a. In response to the claim of petitioner in this action that the responses are traditional rather than commercial speech and are entitled to the full protection of the First Amendment, the Court of Appeals held that responses to boycott-related questionnaires constitute commercial speech because they pertain to commercial transactions and are motivated exclusively by the economic interests of the speaker. App. at 4a-5a.

REASONS FOR GRANTING THE WRIT

This Court has frequently held that speech is not deprived of the traditional protections of the First Amendment merely because it is business-related or is motivated by the economic interests of the speaker. The rule promulgated by the Court of Appeals in this case conflicts with this Court's holdings and threatens serious consequences to every person whose expression is based on his economic self-interest. Moreover, the Court of Appeals disregarded the protection this Court has accorded to speech — traditional and commercial — by relying on the District Court's ruling that speech can be suppressed merely because it is allegedly related to "actions which are repugnant to American values and traditions" and because it allegedly involves unspecified "delicate foreign policy questions."

I.

Under controlling decisions of this Court, the speech here involved is not "commercial," and should not be analyzed under the line of cases that afford less constitutional protection to "commercial" than to other speech.

The Court of Appeals held that truthful responses to boycott-related questionnaires do not constitute traditional speech that is fully protected by the First Amendment, but rather commercial speech, which the government may regulate somewhat more freely, and which the court held in this case could be suppressed entirely. The court rested its classification on two factors: first, the "desire to answer the questionnaires is motivated by economics," App. at 3a, and second, the responses have some relationship to commercial transactions. App. at 4a-5a.

If all speech that fulfills these two criteria were commercial speech, a broad spectrum of fully protected speech would be downgraded. Examples of speech which the government might then suppress include protests of contractors to the boycott of the Soviet pipeline, comments of grain producers about restrictions on grain exports, contributions of manufacturers to the tariff and free-trade debate, and perhaps even advocacy of the election of a political candidate that is motivated by the speaker's desire to have lower tax rates on his business or to enjoy economic benefit from some other change in the law which the candidate supports.

The court's decision is in direct conflict with the decisions of this Court which have carefully stressed that the commercial-speech doctrine is strictly limited to information about a specific proposed commercial transaction,

and which, in practice, have applied the doctrine principally to commercial advertising.

As recently as last term the Court reemphasized that the core notion of commercial speech is speech which does " 'no more than propose a commercial transaction.' " *Bolger* v. *Youngs Drug Products Corp.*, 103 S.Ct. 2875, 2880 (1983) (quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc.*, 425 U.S. 748, 762 (1976) and *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 385 (1973)). The "common sense" distinction to which the court has repeatedly referred is not between speech which somehow pertains to business matters and that which does not, but rather between speech which is exchanged in the limited context of commercial negotiation and all other speech. *See Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978). The Court has rejected any suggestion that speech is deprived of the full protection of the First Amendment merely because it deals with a business subject. *See Virginia State Board of Pharmacy*, *supra*, 425 U.S. at 762-63 (1976).

The Court has also emphasized that economic motivation alone is insufficient to turn expression into commercial speech. *Bolger*, *supra*, 103 S.Ct. at 2880. The Court has long differentiated between commercial speech and economic interest and has accorded the full protection of the First Amendment to economically motivated speech. *See Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (plurality opinion); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978); *Virginia State Board of Pharmacy*, *supra*, 425 U.S. at 762-63 and n.17; *Bigelow* v. *Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966); *AFL* v. *Swing*, 312 U.S. 321, 325-26 (1941); *Thornhill* v. *Alabama*, 310 U.S. 88, 102-04 (1940).

Speech is properly classified as commercial only in the context of advertisements of specific products or services which are proposed for sale or closely analogous matters. "The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 563 (1980). The reason that "regulation of commercial speech based on content is less problematic" than regulation of other speech is "the greater potential for deception or confusion in the context of certain advertising messages. . . ." *Bolger, supra*, 103 S.Ct. at 2879. The rule promulgated by the Court of Appeals includes within the sweep of commercial speech all speech in which the speaker is economically interested, so long as it bears any relationship to business transactions. That represents a serious truncation of traditional First Amendment freedoms.

Petitioners' proposed speech in this case is not advertising and does not otherwise "propose a commercial transaction;" rather it seeks to satisfy a threshold requirement which the Arab states have erected (as they have every right to do) to petitioners' doing any business within their territories. And, while petitioners' motivation for speaking is certainly economic, that of petitioners' "audience" is not; the Arab boycott is based on political and military, not economic, considerations.

II.

In any event, there is no sufficient government interest warranting suppression of the speech here involved even if it is classified as "commercial."

The Court of Appeals, having concluded that responses to boycott-related questionnaires constitute commercial speech, adopted the District Court's opinion in the *Briggs*

& Stratton case, App. C, with respect to the application of the commercial-speech doctrine to the facts of this case. That opinion purported to follow the four-part test that this Court announced in *Central Hudson* and reaffirmed last term in *Bolger*. App. at 47a. According to that test, if the communication is neither misleading nor related to unlawful activity, the government must show that the regulation barring speech serves a substantial interest, that the regulation directly advances that interest, and that it is not more extensive than necessary. *Central Hudson*, *supra*, 447 U.S. at 564, *Bolger*, *supra*, 103 S.Ct. at 2881.

The District Court did not find that the responses to the questionnaire would be either misleading or related to unlawful activity. App. at 47a. The court, quoting a Senate report, found that the government interest consisted of

> "forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugant to American values and traditions.' " App. at 47a-48a.

The court did not specify what would be "repugnant" about truthful responses to questionnaires. Responding to the questionnaires would not cause petitioners to cease business with any person or country, to participate in any boycott, to inculpate any third party, to endorse the Arab boycott or in any other way to modify their behavior. Responses would plainly not involve petitioners in any racial or religious discrimination, which at one time was believed to be present in some aspects of the Arab boycott not involved here and was doubtless the cause for the word "repugnant" in the Senate report.

Boycotts are legal under both United States and international law, and since World War II the United States

has adopted the most aggressive stance of any nation in using boycotts of foreign countries and other trade controls as instruments of its domestic and foreign policy.[6] In implementing its primary and secondary boycotts the United States frequently demands information from foreign persons and blacklists those who fail to supply such information,[7] as well as those who violate other boycott requirements.[8] Thus the United States acts exactly as the Arab countries do in all respects relevant to this case. It follows that the United States cannot seriously contend that such practices are "repugnant" to American values and traditions or that any such "repugnancy" could furnish a substantial interest warranting the suppression even of commercial speech, let alone of "traditional" speech.

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[6] *See* EAA, 50 U.S.C. App. §§ 2402(2)(B), 2402(8), 2404 (Supp. V 1981); Trading with the Enemy Act of 1917, 50 U.S.C. App. §§ 2(a), 3(a), 5(b) (1976); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702(a)(1)(B) (Supp. V 1981); 15 C.F.R. §§ 385.2(c) (1983), 385.2(d)(1) (removed, 48 Fed. Reg. 3360 (1983)), 385.4 (a)(2)-(5), *amended by* 48 Fed. Reg. 3360-61 (1983); *see generally* Abbott, "Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s," 65 Minn. L. Rev. 739 (1981); Berman & Garson, "United States Export Controls—Past, Present, and Future," 67 Colum. L. Rev. 791 (1967).

[7] *See, e.g.*, Elisha Goldman, *et al.*, 42 Fed. Reg. 31,477 (1977) (Office of Export Admin.); Roland Hagn, 37 Fed. Reg. 4,222 (1972) (Office of Export Control); Oporto Trading (Pty.) Ltd. and Maurice J. Fluxman, 37 Fed. Reg. 7,818 (1972) (Office of Export Control); Lucien Dahdah, 35 Fed. Reg. 11,064 (1970) (Office of Export Control); Armazens de Produtos Quimicos de Mocambique, Limitada, 35 Fed. Reg. 14,735 (1970) (Office of Export Control); Logatronik G.m.b.H., 35 Fed. Reg. 19,278 (1970) (Office of Export Control); Yvon LeCoq, 33 Fed. Reg. 18,525 (1968) (Office of Export Control).

[8] *See* 15 C.F.R. § 388 Supp. 1, Table of Denial Orders (1983) (the United States' blacklist).

In any event, the fact that Congress or any other body finds speech "repugnant" or offensive in some way does not provide a legitimate interest permitting its suppression. This Court has explained that

> "offensiveness was 'classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.' "

Bolger, supra, 103 S.Ct. at 2883 (quoting *Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977)). This Court has frequently emphasized that the government's fear of the effects of communications concerning lawful activity is no justification for their suppression. *See Metromedia, supra*, 453 U.S. at 505.

Besides "repugnancy," the only suggestion in the *Briggs & Stratton* District Court opinion, adopted by the Court of Appeals, of any government interest served by the challenged restraint was that "delicate foreign policy questions" are involved. App. at 47a. Yet such "questions" are wholly unidentified, and throughout this litigation, as in the congressional debates on the EAA, no one has suggested any way in which the prohibition against answering questionnaires advances any foreign-policy interest whatever.[9] Indeed, it may serve only to increase the deficit in the United States' balance of payments.

The abridgment of constitutional rights cannot be justified merely by the invocation of such shibboleths as "foreign policy." *See, e.g., United States* v. *Robel*, 389 U.S.

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[9] For example, it has not been shown, or even alleged, that the challenged restraint has made or is likely to make the Arab boycott less effective or that Israel has in any other way been aided thereby.

258, 263-64 (1967); *Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); L. Henkin, *Foreign Affairs and the Constitution* 252-55 (1972). The mere fact that the challenged legislation has international-trade aspects is no substitute for the identification of a specific and substantial governmental interest.

CONCLUSION

A definitive decision on the issues involved herein is particularly necessary because many other companies and their officials are in the same position as petitioners. Three other firms, Crosley International, Inc., Monsanto Co., and R.J. Reynolds Industries, Inc., are in litigation on the same questions that are involved in this case. Those cases have been consolidated for trial and are now pending in the United States District Court for the District of Delaware. *See In Re: Arab Boycott Litigation*, Master File Nr. Misc. 82-32, MDL Docket Nr. 507 (D. Del. July 14, 1982) (transfer order). Moreover, in an administrative proceeding, the Commerce Department has charged Stewart B. McKinney, a member of the U.S. House of Representatives, with violating the EAA by sending publicly available information to Kuwait at the request of a domestic company. *Stewart B. McKinney*, ITA-AB-83-4 (February 16, 1984); *see The Washington Post*, Feb. 22, 1984, § 1, at A3, col. 5.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316
Attorneys for Petitioners

May 1984

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2112, 82-2392

BRIGGS & STRATTON CORPORATION and MICHAEL HAMILTON,
Plaintiffs-Appellants,

v.

MALCOLM BALDRIGE, Secretary of the United States Department of Commerce, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 80 C 721—**Myron L. Gordon, *Judge*.**

No. 83-1258

THE TRANE COMPANY, *et al.*,
Plaintiffs-Appellants,

v.

MALCOLM BALDRIGE, Secretary of the United States Department of Commerce, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 78 C 413—**Robert W. Warren, *Judge*.**

ARGUED NOVEMBER 4, 1983—DECIDED FEBRUARY 24, 1984

Before BAUER and ESCHBACH, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

ESCHBACH, *Circuit Judge*. The appellants contend that they have a First Amendment right to answer questions asked by Arab boycott offices pursuant to the Arabs' trade boycott of Israel. We disagree, and accordingly affirm the judgments of the district courts.

I.

Many Arab countries are engaged in a long-standing trade boycott of Israel. As one means of policing their boycott, the Arabs, through their boycott offices, send questionnaires to companies they suspect are violating the terms of the boycott. Companies are typically questioned about their relationship with Israel, Israeli firms, and other companies that do business with Israel. The Arabs have in the past blacklisted companies which do not return completed questionnaires, although failure to reply does not always result in this sanction. The appellants received such questionnaires. A portion of their business depends on access to the Arab states. The appellants wanted to respond to the questionnaires in order to avoid the possibility of being blacklisted. This they were forbidden to do, however, by the Export Administration Act, 50 U.S.C. App. §§ 2401-2420, and by regulations promulgated under the Act by the Commerce Department. In separate district court proceedings, the appellants attacked the constitutionality of these prohibitions under the First, Fifth, and Ninth Amendments. Both district courts entered summary judgment for the government. *See Briggs & Stratton Corp. v. Baldrige*, 539 F.Supp. 1307 (E.D. Wis. 1982) (Gordon, J.); *Trane Co. v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983) (Warren, J.). Appeals were taken from both judgments, and we consolidated the appeals. We affirm, and adopt Judge Gordon's opinion in *Briggs & Stratton, supra*. We write separately only to address

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*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

the contention that the appellants' proposed answers to the boycott questionnaires are entitled to the full measure of protection afforded by the First Amendment; that is, that the boycott responses should be considered "traditional" rather than "commercial" speech.

II.

The Supreme Court has discussed the distinction between commercial and noncommercial speech in a number of recent cases. Commercial speech has been defined as speech which "does no more than propose a commercial transaction," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), "is confined to the promotion of specific goods or services," *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n.12 (1981), or "is related solely to the economic interests of the speaker and its audience," *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982), *quoting Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 561 (1980). The appellants concede that their desire to answer the questionnaires is motivated by economics: through this lawsuit, appellants hope to avoid the disruption of trade relationships that depend on access to the Arab states. However, they advance three arguments for defining their speech as noncommercial.

First, the appellants argue that each question on the boycott questionnaire is implicitly an allegation that they have engaged in conduct or maintained relationships contrary to the Arabs' boycott principles. They assert that they have a right to answer the questionnaires in an effort to promote the truth about their business relationships. Thus, the appellants contend, their proposed answers are not "related solely to the interests of the speaker and its audience." However, the appellants' interest in disseminating truthful information cannot be distinguished in this instance from their economic interests. We do not understand appellants to be arguing that they would be interested in answering the questionnaires if truthful answers would result in the imposition of economic sanctions.

Rather, their interest is in maintaining their advantageous commercial relationships, and any interest in promoting truth is directly proportional to the economic result it would achieve.

The appellants next argue that their proposed communications are attempts to influence the political decisions of a sovereign government, and as much should be fully protected. The appellants reason that the questionnaires are sent to companies by the Arabs in an attempt to enforce their economic boycott of Israel. The decision to boycott Israel is itself a political decision, as is the decision to blacklist those who do not comply with boycott principles. Therefore, the appellants argue, their answers to the questionnaires should be viewed as attempts to influence political decision-making.

Despite appellants' attempts to color their communications with a protected interest in political speech, this argument must also fail. The appellants are free to communicate their views about the relative merits of the Arabs' political decisions directly to the Arabs if they choose, so long as in doing so they do not furnish information about business relationships with boycotted countries or blacklisted persons in violation of the Act. However, the appellants do not seek to answer the questionnaire in order to influence the Arabs' decision to conduct or enforce a trade boycott with Israel. The Arabs' policy in conducting their boycott is irrelevant to appellants' answers. They wish through their answers only to show that the boycott's sanctions should not be applied to them, because they have not violated its terms.

Finally, the appellants argue that the presence of economic motivation alone is not enough to show that speech is commercial. We need not disagree, but it does not follow, of course, that all economically-motivated speech is fully protected noncommercial speech. The commercial speech doctrine was created to afford a measure of First Amendment protection to speech, such as appellants', pertaining to traditonally-regulated commercial activity. The hallmark of commercial speech is that it pertains to commercial transactions, whether

those proposed through product advertising, as in *Virginia State Board of Pharmacy*, *supra*, or facilitated through the use of a trademark, as in *Friedman v. Rogers*, 440 U.S. 1 (1979), or implicated in some other manner. The Supreme Court has stated:

> Expression concerning purely commercial transactions has come within the ambit of [the First] Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," . . . we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. . . . We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (citations omitted). The appellants' proposed answers to boycott questionnaires would serve only to allow appellants to continue to maintain commercial dealings with the Arab world. The government has traditionally regulated the area of international trade. Applying the common-sense distinction articulated in *Ohralik*, we hold that the appellants' proposed communications are commercial speech.

III.

For the reasons ably expressed by Judge Gordon in his opinion, and for the reasons stated above, the judgments of the district courts are affirmed.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case No. 78-C-413
(W.D.)

THE TRANE COMPANY, *et al.*,
Plaintiffs,

vs.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Defendants.

DECISION AND ORDER

This is the second of two "Arab boycott" cases to come before the federal courts in Wisconsin. On May 10, 1082 [sic], Judge Gordon granted the defendants' motion for summary judgment in *Briggs & Stratton Corp.* v. *Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982), upholding the validity of certain provisions of the Export Administration Act of 1979, 50 U.S.C. App. § 2401 *et seq.*, and certain regulations which make it unlawful "to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States . . . ." 50 U.S.C. App. § 2407(a)(1). The instant case presents another challenge to the same legislation. The plaintiffs contend that portions of the act and regulations violate the First, Fifth, and Ninth Amendments of the United States Constitution. Accordingly, they seek an order declaring the challenged legislation unconstitutional and enjoining the defendants from enforcing its prohibition against them. The parties have stipulated to a statement of facts and have fully briefed cross-motions for summary judgment. For the reasons indicated below, the Court will grant defendants' motion for summary judgment.

I. BACKGROUND

The following factual summary is based primarily upon the Stipulation of Facts which was filed by the parties on March 31, 1982 and which the Court now adopts as part of its findings of fact.

Plaintiff, The Trane Company (Trane), is a Wisconsin corporation engaged in the manufacture of air conditioning, refrigeration, and heat transfer equipment. It does a substantial amount of business with various nations which are members of the League of Arab States. (Stip. ¶ 1.) Plaintiff Maurice Bouchard is the Vice-President, Southern Hemisphere and Middle East, for Trane. (Stip. ¶ 5.) Plaintiff United Technologies Corporation (UTC) is a Delaware Corporation engaged in the manufacture of jet engines, helicopters, elevators and escalators, air conditioning equipment, and other products within three principal lines of business — power, flight systems, and industrial products and service. UTC also does a substantial amount of business with Arab League countries. (Stip. ¶ 6.) Plaintiff Nicholas Tomassetti is Vice-President, Marketing and Customer Support, of the Power Group/Commercial Products Division of UTC, having responsibility for the Middle East and Africa Region. (Stip. ¶ 6.)

The League of Arab States is composed of 21 Arab states. On December 11, 1954, its council passed a resolution calling for an economic boycott of the State of Israel. (Stip. ¶ 7.) Sometime thereafter, the League formed an organization called the Central Boycott Office, whose purpose is to facilitate communications among the local boycott offices of the boycotting states, gather boycott-related information, investigate and administer certain aspects of the boycott, and make recommendations concerning firms or individuals that should be blacklisted by participating Arab states. (Stip. ¶ 7.) All Arab states that participate in the boycott of Israel represent that their boycott activities are governed by a document entitled "General Principles for Boycott of Israel." Each state, however, retains sovereign rights over boycott activities. In a significant number of cases, these states have not followed the provisions of the document. (Stip. ¶ 8.)

The Arab boycott of Israel occurs on three levels. The "primary boycott" involves a refusal by the governments of the participating countries to deal, and a prohibition on their residents from dealing, directly with, or in the goods of, Israel or Israeli firms. The primary boycott is enforced by 16 Arab states. (Stip. ¶ 9.) The "secondary boycott" involves a refusal by the governments of participating Arab states to deal, and a prohibition on their residents from dealing, with persons or firms, or in the goods or services of persons or firms, which, although not Israeli, have been "blacklisted" by boycott officials of these Arab states. (Stip. ¶ 10.) The "tertiary boycott" involves a requirement by participating governments that persons or firms not deal with blacklisted firms in certain circumstances. The secondary and teritiary [sic] aspects of the boycott are enforced in varying degrees in 13 Arab states. (Stip. ¶ 10.)

Generally, decisions to blacklist a firm or person originate with local boycott authorities in one of the 13 Arab states participating in the secondary or tertiary aspects of the boycott, although they may originate with the Central Boycott Office. An investigation by a local boycott office may arise as a result of information indicating the target firm or person may not be in conformance with the document entitled "General Principles for the Boycott of Israel," or it may arise for no ascertainable reason. If a local boycott office is not satisfied as to the target's compliance with the "General Principles," it may blacklist or warn the target, direct other governmental agencies in the country not to deal with the target, and/or propose that the Central Boycott Office recommend that the target be blacklisted by the 13 Arab states enforcing the secondary and tertiary boycotts. It may, however, take no action whatsoever. (Stip. ¶ 11.)

As a means of gathering boycott-related information, the local boycott office in an Arab state may send a questionnaire to a target seeking formal written responses as to the target's business affiliations, relationships with Israel, relationships with blacklisted persons or firms, and other matters. Failure by a target to respond to such a questionnaire within the prescribed

time period makes it more likely than not that the target will be blacklisted by the country sending the questionnaire and that the target will be recommended for blacklisting to the Central Boycott Office. (Stip. ¶ 12.) In the event a proposal for blacklisting is made to the Central Boycott Office, there is a reasonable likelihood that the Central Boycott Office will recommend that the persons or firms be blacklisted by all of the Arab states participating in the secondary and tertiary aspects of the boycott. In the event such a recommendation is made, it is more likely than not that a blacklisting of the target will occur in at least some of the participating Arab states. (Stip. ¶ 13.) In the event a person or firm is blacklisted, the "General Principles" provide that its products and services will be denied entry into the boycotting states. (Stip. ¶ 14.)

In the mid-1970's, Congress became concerned about Arab efforts to pressure American companies into participating in the boycott of Israel. Various examples of such pressure were cited. *See* S.Rep.No. 95-104, 95th Cong., 1st Sess. 16-18 (1978) (Senate Report); Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Report of the Arab Boycott and American Business,* 10-11, 41-42 (Subcomm. Print 1976). *Cf. Briggs, supra,* 539 F. Supp. at 1310. In 1977, Congress enacted antiboycott legislation as an amendment to the Export Administration Act. Pub.L.No. 95-52, 93 Stat. 503 (codified at 50 U.S.C. App. § 2401 *et seq.* (Supp. III 1979)). The 1977 Amendments authorized the President to issue regulations making it a criminal offense for any "United States person" to take or agree to take certain boycott-related actions with respect to his activities in United States commerce. The Department of Commerce promulgated such regulations, which took effect on January 18, 1978. *See* 43 Fed. Reg. 3508 (1978). In 1979, the Export Administration Act extended the foreign-boycott provisions of the 1977 Amendments, with no changes effecting [sic] the present litigation. *See* 87 F.R.D. 473, 474.

One of the provisions of the anti-boycott legislation, along with the implementing regulations promulgated by the Commerce Department, prohibits United States persons from intentionally complying with demands from foreign boycott

officials for information in response to a boycott questionnaire. *See* 50 U.S.C. App. § 2407(a); 15 C.F.R. 369.2. The legislation does not prevent a United States person from providing information on its business operations to a boycotting country in a normal commercial context. *See* 15 C.F.R. § 369.2(d)(3). The restriction touches upon such information only if it would be furnished for boycott-related purposes through a questionnaire or otherwise. *See* 15 C.F.R. § 369.2(d)(4).

On July 19, 1978, plaintiffs Trane and Bouchard received a letter from their distributor in Kuwait enclosing a letter and questionnaire from the boycott office of the Kuwaiti government. The letter and questionnaire constitute an official request for information concerning Trane's business relationships and activities with respect to certain companies and with Israel or Israeli firms. (Stip. ¶ 15.) The parties have agreed that Trane's and Bouchard's responding to the Kuwaiti questionnaire by furnishing the information sought is proscribed by the Commerce Department regulations which are the subject of this action. (Stip. ¶ 16.) Trane has requested the Kuwaiti boycott authorities to grant an indefinite extension of time in which to respond to the questionnaire pending the resolution of this lawsuit. There has been no official response to this request. Trane has not received notice that it has been blacklisted. (Stip. ¶ 17.)

On October 29, 1980, plaintiff UTC received a letter from the Central Boycott Office containing several questions which inquire about UTC's business relationships with Israel and Israeli firms and about what firms are owned by UTC or have ownership interests in UTC. (Stip. ¶ 19.) The parties have agreed that UTC's and Tomassetti's responding to the Central Boycott Office questionnaire by furnishing the information sought is proscribed by the Commerce Department's regulations challenged in this suit. UTC has not been notified whether it would be denied an indefinite extension of time in which to respond pending resolution of this suit. Neither has UTC been informed that it has been blacklisted. (Stip. ¶ 20.)

If called upon to testify, witnesses for Trane and Bouchard would testify that Trane officials have no knowledge of the reasons why the Kuwait boycott office submitted the questionnaire to Trane. (Stip. ¶ 18.) Witnesses for UTC and Tomassetti would likewise testify that UTC officials have no knowledge why UTC was selected by the Central Boycott Office to receive the questionnaire. (Stip. ¶ 21.) Witnesses for the plaintiffs would further testify that company officials believe that, if permitted to give responsive answers to the questionnaires (without otherwise violating the Export Administration Act and accompanying regulations), Trane and UTC would be able to avoid blacklisting. (Stip. ¶¶ 18, 21.) The parties have agreed that some of the information called for in the questionnaires is publicly available from various sources. If the questionnaires were answered, Arab boycott officials would be able to satisfy their need, if any, for the requested information without the inconvenience of consulting public sources. (Stip. ¶ 23.)

The "General Principles for Boycott of Israel" provide that one of the bases for blacklisting is refusing to respond, within the period of warning, to a questionnaire which seeks to clarify a firm's position and determine its relationship with Israel. (Stip. ¶ 27.) If called upon to testify, witnesses for the plaintiffs would testify that Trane and UTC are fearful that their failure to respond to the questionnaires will result in their being blacklisted. (Stip. ¶ 29.)

Although it is impossible to predict with certainty what action a particular Arab state will take in any specific circumstances, the parties have agreed that the failure to answer an inquiry from an Arab boycott authority makes it more likely than not that the firm not responding will be blacklisted and have its products banned by one or more Arab state. (Stip. ¶ 29.) The parties also have agreed that, if either Trane or UTC is blacklisted by members of the Arab League in which the companies do business, it is more likely than not that the respective company's goods will be denied entry by the blacklisting members. Such action could adversely affect each company economically, adversely affect a portion of each

company's workforce, and cause substantial personal, professional, and economic hardship for plaintiffs Bouchard and Tomassetti. (Stip. ¶¶ 30, 31.)

Commerce Department officials have advised Trane and UTC that, under the facts agreed to by the parties, responsive information furnished by Trane and UTC to the questionnaires received would contravene the Department's regulations which are being challenged in this suit. Department officials have also informed Trane and UTC that the defendants, four of the highest ranking government officials charged with enforcing the legislation (Stip. ¶¶ 32-35), could, upon learning that any responsive information had been furnished by Trane or UTC or on their behalf, seek to impose one or more of the statutory penalties provided for such violations. (Stip. ¶ 22.)

The only part of the Export Administration Act which the plaintiffs challenge in this suit is that portion which prohibits any United States person from communicating information about its past or present business relationships with a boycotted country or with blacklisted firms or persons. That prohibition appears in Section 8(a)(1)(D) of the Export Administration Act of 1979, 50 U.S.C. App. § 2407(a)(1)(D):

> (a)(1) For the purpose of implementing the policies set forth [herein] . . . the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not of itself the object of any form of boycott pursuant to United States law or regulation:
>
> (D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping, or other transport, insurance, investment or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any

national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

The plaintiffs also challenge that portion of the regulations promulgated by the Commerce Department to implement the above-quoted provision. *See* 15 C.F.R. §369.2(d).[1]

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[1] The challenged portion of the regulations provides as follows:

(d) *Furnishing information about business relationships with boycotted countries or blacklisted persons.*

Prohibition Against Furnishing Information About Business Relationships With Boycotted Countries or Blacklisted Persons

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

(2) This prohibition shall apply:

(i) whether the information pertains to a business relationship involving a sale, purchase, or supply transaction; legal or commercial representation; shipping or other transportation transaction; insurance; investment; or any other type of business transaction or relationship; and

(ii) whether the information is directly or indirectly requested or is furnished on the initiative of the United States person.

(3) This prohibition does not apply to the furnishing of normal business information in a commercial context. Normal business information may relate to factors such as financial fitness, technical competence, or professional experience, and may be found in documents normally available to the public such as annual reports, disclosure statements concerning securities, catalogues, promotional brochures, and trade and business handbooks. Such information may also appear in specifications or statements of experience and qualifications.

(4) Normal business information furnished in a commercial context does not cease to be such simply because the party soliciting the information may be a boycotting country or a national or resident thereof. If the information is

(footnote continues)

In challenging the portions of the Act and regulations noted above, plaintiffs make essentially four arguments. First, they contend that the prohibition against responding to the Arab questionnaires suppresses their First Amendment right of free speech. Plaintiffs contend that, whether the proposed communications are characterized as traditional, non-commercial speech (which they contend is the correct analysis) or as commercial speech, the prohibition is invalid because it is not narrowly drawn to advance directly substantial governmental interests. Second, plaintiffs argue that the prohibition is invalid under the Due Process Clause of the Fifth Amendment because it is arbitrary and draws irrational distinctions, with the effect of unfairly placing enormous burdens on a few people, disporportionately to any legitimate governmental interests. Third, plaintiffs contend that the challenged prohibition violates their right to procedural due process under the Fifth Amendment because it places them in jeopardy of being deprived of substantial property interests without any opportunity to correct or otherwise respond to implicit misinformation in the questionnaires. Finally, plaintiffs assert that the prohibition violates the Ninth Amendment (as well as principles established under the First, Fifth, and Sixth Amendments) because it denies them their fundamental right to correct misapprehensions or otherwise provide facts about themselves, without advancing any compelling governmental interest which would warrant such a denial. The Court will address these arguments separately below.

(footnote continued)

of a type which is generally sought for a legitimate business purpose (such as determining financial fitness, technical competence, or professional experience), the information may be furnished even if the information could be used, or without the knowledge of the person supplying the information is intended to be used, for boycott purposes. However, no information about business relationships with blacklisted persons or boycotted countries, their residents or nationals, may be furnished in response to a boycott request, even if the information is publicly available. Requests for such information from a boycott office will be presumed to be boycott-based.

(5) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

II. FIRST AMENDMENT CHALLENGE

A. Traditional v. Commercial Speech

Plaintiffs argue that the prohibition against their responding to the Arab questionnaires violates their right to free speech under the First Amendment. In so arguing, they contend that their proposed communications in response to the questionnaires are entitled to the full First Amendment protection afforded to "traditional speech" rather than the more limited protection given to "commercial speech," as those terms have been defined by the Supreme Court. *See Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 455-56 (1978). *See, generally, Briggs, supra,* 539 F. Supp. at 1317-18.

The Supreme Court has recognized the distinction between commercial speech and traditional speech in a number of cases. In *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Court described commercial speech as that which does "no more than propose a commercial transaction." *Id.* at 762 (quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. 376, 385 (1973). *Accord, Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n,* 447 U.S. 557, 562 (1980); *Ohralik* v. *Ohio State Bar Ass'n, supra,* 436 U.S. at 455-56. In *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980), the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561 (citing *Virginia Pharmacy Bd., supra; Bates* v. *State Bar of Arizona,* 433 U.S. 350, 363-64 (1977); *Friedman* v. *Rogers,* 440 U.S. 1, 11 (1979)). *Accord, In re R.M.J.,* 455 U.S. 191, 204 n. 17 (1982).

Plaintiffs argue that the foregoing descriptions of commercial speech do not apply to the proposed communications at issue here. They contend that responses to the questionnaires would not "propose a commercial transaction," *Virginia Pharmacy Bd., supra.* Defendants agree that the information that would be contained in such responses would not in itself "propose a commercial transaction,"[3] but note that plaintiffs

would have no occasion to even answer the questionnaires if it were not their desire to promote business with the Arab states. Plaintiffs also argue that the proposed communications here do not constitute "expression related solely to the economic interests of the speaker and its audience," *Central Hudson, supra,* because more than economic interests are at stake. They assert that the communications are necessary to promote the truth concerning their business relationships and to dispel any misapprehensions which the Arabs might have about them.

The Court cannot accept plaintiffs' argument. While it is true that responses to the questionnaires would not themselves "propose a commercial transaction," it is abundantly clear that plaintiffs' sole interest in providing responsive answers is economic. To the extent that the plaintiffs have an interest in promoting truth or dispelling misapprehensions, it is directly related to their ultimate interest in continuing to do business with the Arab states.[2] Judge Gordon reached a similar conclusion in denying the plaintiffs' motion for reconsideration in the *Briggs* case: "It is irresistibly obvious that the plaintiffs' responses to the questionnaires were calculated to further Briggs' business relations with certain countries rather than to enlighten the general public, or to edify society." 544 F. Supp. at 668. The Court concludes, therefore, that plaintiffs' challenge to the prohibition against responding to the questionnaires must be considered in light of the First Amendment standards for commercial speech.

B. Commercial Speech Standards

Plaintiffs contend that, even when measured under First Amendment standards for commercial speech, the challenged prohibition is unconstitutional. This is so, argue plaintiffs, because the legislation does not directly advance substantial governmental interests and, even assuming it did, is more extensive than necessary to further such interests.

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[2] Plaintiffs contend, nonetheless, that speech may be considered "traditional" even when the underlying interests are economic. *See* Plaintiffs' Reply Mem. at 9. The Court is not persuaded that the cases cited by plaintiffs in support of this argument are sufficiently analagous [sic] to the instant case to justify a characterization of the communication at issue as "traditional."

The test for determining the constitutionality of a governmental restraint on commercial speech was articulated by the Supreme Court in *Central Hudson, supra:*

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564. The Court went on to explain the above-quoted passage as establishing a four-part analysis for First Amendment challenge to restrictions on commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

In the instant case there is no issue regarding whether the prohibited communications are misleading or related to unlawful activity. The challenged prohibition is against *all* communications in response to the Arab questionnaires, and the plaintiffs seek only to provide truthful information. There are no state or federal laws (other than the portions of the Export Administration Act and regulations challenged here) that would make the proposed communications unlawful. (Stip. ¶ 23.) Neither is there anything unlawful about the underlying activity involved (trade with Arab nations) which would necessarily deprive the plaintiffs of First Amendment protection. *Cf. Pittsburgh Press, supra.* Thus, the Court must determine whether the challenged prohibition (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no farther than necessary to accomplish that interest. *Central Hudson, supra; In re R.M.J., supra,* 455 U.S. at 191 n.15.[3]

1. The Governmental Interest

The Court concludes that the governmental interest here is substantial, "involving delicate foreign policy questions and the interest of the government in forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'" *Briggs, supra,* 539 F. Supp. at 1319 (quoting *Senate Report* p. 21). The statutory policy underlying the challenged prohibition is stated in 50 U.S.C. App. § 2402(5)(A):

> It is the policy of the United States . . . to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person.

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[3] The Court rejects defendants' argument that, because of the nature of the challenged prohibition, the First Amendment does not even apply to plaintiffs' proposed communications. *See* Defendants' Mem. at 30-31.

Congress believed that to permit "U.S. persons to supply information when they know it is being sought for boycott enforcement purposes . . . would be to sanction active complicity in boycott implementation." *Senate Report*, p. 25.

Plaintiffs argue that the asserted governmental interests are not substantial. They describe at length how the United States, like the Arab League states, has over the years employed its own boycott tactics in carrying out foreign policy. *See* Plaintiffs' Reply Mem. at 30-39. The short answer to plaintiffs' long argument is that whether or not the United States engages in similar boycott activities is simply not material to determining whether there is a substantial governmental interest underlying the challenged legislation. Plaintiffs also argue that the challenged legislation has nothing to do with American foreign policy. They contend that Congress passed the legislation merely as a response to domestic political pressures opposed to the Arab boycott. Whether this was, in fact, Congress' real motive in passing the 1977 Amendments is something which cannot be ascertained and which, as a matter of proper constitutional adjudication, should be disregarded. *See United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

In light of the statements regarding the purpose of the challenged legislation, noted both in the 1977 Amendments and the legislative history, the Court concludes that there is, in fact, a substantial governmental interest underlying the challenged prohibition.[4]

2. Advancement of Governmental Interest

The Court concludes that the prohibition against responding to the Arab questionnaires directly advances the governmental interest of not allowing United States persons to become involved in perpetuating the Arab boycott of Israel. Although it is true that the prohibition cannot completely cut off the flow

[4] In reaching this conclusion, the Court relies not only upon the portions of the legislative history quoted in the text, but also upon various other passages which are specifically noted in defendants' brief. *See* Defendants' Mem. at 31-33.

of information sought by the questionnaires (because some of the information is available publicly), the prohibition removes United States persons from the unseemly position of being forced to provide information used in the boycott of Israel. *Cf. Briggs, supra,* 539 F. Supp. at 1319. Moreover, the prohibition makes the gathering of such publicly-available information a more expensive and inconvenient task for the boycotters. (Stip. ¶ 23.) To this extent, the prohibition furthers the statutory policy of opposition to the boycott of a country friendly to the United States. *See* 50 U.S.C. App. § 2402(5)(A).

3. Narrowly Drawn

Plaintiffs contend that the challenged prohibition could have been more narrowly drawn to achieve the stated governmental interest. For example, they suggest that the prohibition could have been drafted so as to forbid affirmative responses (as opposed to denials) to the implicit allegations in the questionnaires that an American firm is engaged in conduct inconsistent with the boycott principles. This suggestion has only a simplistic appeal. If the prohibition were as stated above, boycott officials would be advised to impose sanctions only upon those firms which refuse to respond to questions. Plaintiffs also suggest that the prohibition could have been drafted to prohibit the supplying of information which is not readily available from public sources within the United States. Yet, as previously noted, the use of questionnaires makes it easier for boycott officials to gather boycott-related information through the cooperative efforts of American firms. Thus, the prohibition against responding to the questionnaires even with publicly-available information advances the stated governmental interest. The Court concludes, therefore, that the challenged prohibition is not more extensive than is necessary to serve the stated governmental interest.[5]

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[5] In this regard, the Court also finds persuasive the reasoning set forth by Judge Gordon in *Briggs, supra:*

To attempt to parse the prohibitions to exclude answers that transmit information readily available elsewhere, or information that arguably is not useful to the boycotters would be a difficult, if not impossible, regulatory task. Substantial questions of interpretation immediately suggest themselves; the regulatory process would be vastly complicated, frustrating the governmental interest.

539 F.Supp. at 1319.

For the reasons indicated above, the Court holds that the challenged portions of the statute and regulation do not violate plaintiffs' First Amendment rights.

III. SUBSTANTIVE DUE PROCESS CHALLENGE

Plaintiffs argue that their right to due process under the Fifth Amendment is violated because the challenged prohibition is arbitrary and unreasonable, placing an unfair burden on certain persons disproportionately to any legitimate governmental interest.

The Due Process Clause of the Fifth Amendment affords protection against arbitrary and irrational governmental action. *See, e.g., Moore* v. *City of East Cleveland,* 431 U.S. 494, 498 n. 6 (1977); *Nachman Corp.* v. *Pension Benefit Guaranty Corp.,* 592 F.2d 947, 958 (7th Cir. 1979), *aff'd* 446 U.S. 359 (1980). In determining whether an act of Congress infringes upon substantive due process rights, the Court must look upon "whether the legislation represents a rational means to a legitimate end." *Nachman, supra,* 592 F.2d at 960. The Court must keep in mind that the challenged law "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-88 (1955). Moreover, there is a presumption favoring the judgment of the legislature as to the necessity and reasonableness of a particular measure.[6] *Nachman, supra,* 592 F.2d at 963.

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[6] Plaintiffs argue that the presumption of constitutionality which is normally associated with acts of Congress does not exist in the instant case because of the unusually determinative role played by private lobbyists and interest groups in the formulation of the anti-boycott provisions. *See* Plaintiffs' Reply Mem. at 62. As the Court has previously indicated in Part II B, *supra,* however, proper constitutional analysis does not allow for such speculation concerning Congress' motive in enacting the legislation. *See United States* v. *O'Brien, supra,* 391 U.S. at 383.

In *Nachman, supra,* the Seventh Circuit noted that "[r]ationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." 592 F.2d at 960. The Court set forth several factors to be considered in evaluating the nature and scope of the burden. Those factors include: the interests of the parties affected; whether the impairment of the private interest is effected in an area previously subjected to regulatory control; the equities of imposing the legislative burdens; and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *Id.* In *Beller* v. *Middendorf,* 632 F.2d 788 (9th Cir. 1980), *cert. denied,* 101 S.Ct. 3030 (1981), the Ninth Circuit stated the factors to be considered another way: "[S]ubstantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals." *Id.* at 807.

The Court concludes that, weighing the above factors in light of the record presented in the instant case, the challenged prohibition withstands substantive due process scrutiny. Initially, the Court notes that the legitimacy of the governmental interest underlying the challenged prohibition has already been adequately discussed in regard to the plaintiffs' First Amendment challenge. The Court concluded above that the government's interest in preventing American firms from actively cooperating in the boycott of Israel is a substantial one.

The interest of the plaintiffs, on the other hand, is purely economic. Although the record indicates that it is more likely than not that the failure of Trane and UTC to answer the questionnaires will result in adverse economic consequences, (Stip. ¶ 29-31), it is well established that "Congress has broad latitude to readjust the burdens of the private sector in furtherance of a public purpose." *Nachman, supra,* 592 F.2d at 958. Plaintiffs argue, nonetheless, that the economic impact of the

challenged prohibition is disproportionate and unfairly burdens arbitrarily selected persons, such as Trane and UTC. There is, however, nothing in the legislative scheme adopted by Congress which would necessarily create a disproportionate burden on the plaintiffs. To the extent that there is a disporportionate impact or arbitrary effect on certain persons, it is due to the actions of Arab boycott officials, not to the legislation challenged here.

It is important to note also that the governmental regulation challenged here occurs in an area — international commerce — which Congress traditionally has had authority to regulate pursuant to the powers enumerated in Article I, Section 8 of the Constitution. *See California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974).

Finally, the Court notes, as it did previously with regard to plaintiffs' First Amendment argument, that the legislation challenged here is narrowly drawn so as to moderate the impact of the burden. The only information which a United States person is prohibited from providing is boycott-related information requested by boycott officials or which furthers the boycott, such as the information which the plaintiffs wish to provide in response to the questionnaires received. As noted previously, the Commerce Department regulations do not prevent United States persons from providing business information to boycotting countries in the normal commercial context. *See* 15 C.F.R. § 369.2(d)(3). Thus, the statute and regulations go no farther than is reasonably necessary to stifle the flow of boycott-related information from American companies. *Cf. Briggs, supra*, 539 F. Supp. at 1316-17.

Having considered the various factors noted by the Seventh Circuit in *Nachman* and by the Ninth Circuit in *Beller*, the Court finds that the challenged portions of the legislation "represent a rational means to a legitimate end." *Nachman, supra.* This is so notwithstanding the various examples of alleged irrationality cited by plaintiffs in their initial brief. *See* Plaintiffs' Mem. at 79-85. While these various examples may serve to illustrate the difficulty involved in drafting a perfect statute or regulation, or perhaps demonstrate that certain

hardships may be placed upon the plaintiffs, they do not, in the Court's view, indicate that the challenged legislation is arbitrary and irrational.

For the foregoing reasons, the Court must reject plaintiffs' Fifth Amendment substantive due process argument.

IV. PROCEDURAL DUE PROCESS CHALLENGE

Plaintiffs argue that the challenged prohibition violates their right to procedural due process under the Fifth Amendment because it places them in jeopardy of being deprived of substantial property interests without first having an opportunity to correct or otherwise respond to implicit misinformation in the questionnaires. They contend that the challenged provisions prevent them from minimizing the risk that Arab states will erroneously impose sanctions upon them pursuant to the general boycott principles. While conceding, as they must, that the Fifth Amendment does not require Arab states to provide notice and an opportunity to be heard before the imposition of sanctions (i.e., blacklisting), plaintiffs argue that the challenged prohibition is unconstitutional because it "authorizes, encourages, and virtually compels the result which is forbidden by the Fifth Amendment." Plaintiffs' Mem. at 87-88 n. 1. As plaintiffs characterize their argument, "This is not a case where plaintiffs claim that a private person has shot them under color of governmental authority, but rather a case where the Government has actively prevented the plaintiffs from dodging as the trigger is pulled." *Id.*

Plaintiffs are correct that the Fifth Amendment's protection is not limited merely to conduct initiated by the government. *See Bell & Howell Co.* v. *NLRB*, 598 F.2d 136, 149 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979). Government actions which "authorize" or "encourage" private conduct which the government is forbidden to engage in by virtue of the Fifth Amendment is equally proscribed. *Id.* (citing *Reitman* v. *Mulkey*, 387 U.S. 369, 375 (1967). But this is not a case of the government authorizing or encouraging private conduct which would be

unlawful if engaged in by the government. Unlike the facts in *Bell & Howell, supra,* and *NLRB* v. *Mansion House Center Management Corp.,* 473 F.2d 471 (8th Cir. 1973), the present case does not involve government recognition or enforcement of unlawful conduct. Thus, plaintiffs' procedural due process rights are not implicated by reason of the threat of boycott sanctions.

Moreover, contrary to plaintiffs' assertion, the prohibition challenged here does not "virtually compel" the imposition of sanctions upon Trane and UTC. As stated in the stipulation of facts, the prohibition against the plaintiffs answering the questionnaires only makes it "more likely than not" that sanctions will be imposed by boycott authorities. (Stip. ¶¶ 29-31). Thus, the threat to the plaintiffs' economic interests are at best only probable.

For the reasons stated above, the Court concludes that the challenged prohibition does not violate plaintiffs' Fifth Amendment procedural due process rights.

V. NINTH AMENDMENT CHALLENGE

As their final argument, plaintiffs assert that the prohibition against furnishing information violates the Ninth Amendment (as well as various principles established by the First, Fifth, and Sixth Amendments) because it denies them their fundamental right to correct misapprehensions by providing truthful information about themselves, without advancing a compelling governmental interest which would justify such a denial.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), the Supreme Court held that the Constitution provides protection for certain fundamental rights not specifically enumerated therein. The opinion of the Court described these rights as "penumbras" of the specific

guarantees of the Bill of Rights. *Id.* at 484. In his concurring opinion, Justice Goldberg concluded that these rights have as their constitutional authority the Ninth Amendment. *Id.* at 486-499. He described these rights as "fundamental personal rights," *id.* at 492, and concluded that the test for determining the existence of such rights is "whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . .' " *Id.* at 493 (quoting *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932)).

In the instant case, plaintiffs seek to extend the Ninth Amendment's protection to their desired communications, citing fundamental rights stemming from the First, Fifth, and Sixth Amendments. *See* Plaintiffs' Mem. at 90-92. In the Court's view, however, this proposed extension of Ninth Amendment protection is without merit. Whether viewed as penumbral rights emanating from the guarantees of the Bill of Rights, or as fundamental rights preserved by the Ninth Amendment, the rights which plaintiffs cite here with regard to their desired communications do not constitute the type of personal liberties or interests in privacy which traditionally have been viewed as fundamental. *Cf. Fitzgerald* v. *Porter Memorial Hospital*, 523 F.2d 716, 719-21 (7th Cir. 1975); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969). Plaintiffs have provided no persuasive authority which would justify the extension of Ninth Amendment protection to their desired communications. Accordingly, the Court concludes that plaintiffs' Ninth Amendment challenge must be rejected. *Cf. Briggs, supra*, 539 F. Supp. at 1317.

CONCLUSION

Summary judgment is appropriate when it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fitzsimmons* v. *Best*, 528 F.2d 692, 694 (7th Cir. 1976); Fed. R.Civ.P. 56(c). Here, the parties have filed cross-motions for summary judgment on the basis of a very thorough record which leaves no material facts in dispute. On the basis of that record, the Court concludes that the challenged prohibition against furnishing information does not infringe upon the plaintiffs' First Amendment right of free speech, their Fifth Amendment substantive or procedural due process rights, or their rights under the Ninth Amendment. Accordingly, the Court holds that defendants are entitled to judgment as a matter of law.

Therefore, the Court hereby DENIES plaintiffs' motion for summary judgment and GRANTS defendants' motion for summary judgment.

SO ORDERED this 4th day of January 1983, at Milwaukee, Wisconsin.

/s/ ROBERT W. WARREN

ROBERT W. WARREN
United States District Judge

APPENDIX C

BRIGGS & STRATTON CORPORATION, a Delaware corporation, and Michael Hamilton, Plaintiffs,

v.

Malcolm BALDRIGE, Secretary of the United States Department of Commerce, Lionel H. Olmer, Under Secretary for International Trade, United States Department of Commerce, William French Smith, Attorney General of the United States, and Ronald Reagan, President of the United States, Defendants.

No. 80-C-721.

United States District Court,
E. D. Wisconsin.

May 10, 1982.

Quarles & Brady by Elwin J. Zarwell, Samuel J. Recht, Carolyn A. Gnaedinger, and Joan P. Clark, Milwaukee, Wis., for plaintiffs.

Neil H. Koslowe, Cecil Hunt, Asst. Gen. Counsel, Dept. of Commerce, Pamela P. Breed, Deputy Asst. Gen. Counsel, Daniel C. Hurley, Jr., Dept. of Commerce, Washington, D.C., for defendants.

DECISION and ORDER

MYRON L. GORDON, District Judge.

This action challenges the constitutionality of certain provisions of the Export Administration Act of 1979, 50 U.S.C.App. § 2401 *et seq.*, and certain regulations which make it unlawful "to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States. . . ." 50 U.S.C.App. § 2407(a)(1). In this case, the boycott is that of the League of Arab States against Israel and those companies doing business with Israel.

The plaintiffs contend that the act and regulations violate their rights under the first, fifth, and ninth amendments. The parties have submitted a stipulation of facts and have fully briefed cross motions for summary judgment.

I. FACTUAL BACKGROUND

The following resume is not intended to set forth all the facts, but rather it is designed to provide a framework for the discussion of the issues. The parties have filed a stipulation of facts which I now adopt as a part of the court's findings of fact. However, there is some dispute over what else is properly before me. The government in its brief filed on November 4, 1981, has included a discussion of certain legislative reports and the findings therein. The plaintiffs contend that the parties have stipulated to the facts in this case and that the court "should not consider the government's new, extra-record suddenly obtained 'knowledge'." Plaintiffs' brief, filed November 25, 1981, p. 3. In my opinion, the stipulation of facts does not foreclose my inspecting the legislative background of the statute and regulations. Accordingly, I reject the plaintiffs' contention that I should ignore the material from the reports. *See, e.g., Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979); *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 545-46, 98 S.Ct. 2923, 2931-32, 57 L.Ed.2d 932 (1978).

On December 11, 1954, the council of the League of Arab States approved a resolution calling for an economic boycott of Israel. Since that time, a boycott of varying effectiveness has been conducted by members of the League. To implement the boycott, the League formed

> ". . . the Central Boycott Office, with headquarters presently in Damascus, Syria, which facilitates communications among the boycott offices of the individual boycotting states and makes recommendations concerning enforcement of the boycott to the individual states." Stipulation of Facts, ¶ 6.

The boycott is not confined to actual trade with Israel. It also applies to dealings with companies that have been "black-

listed" for activities "deemed to be inconsistent with the purported 'General Principles for the Boycott of Israel' (June 1972), published by the Central Boycott Office and the League of Arab States." Stipulation, ¶ 8. These so-called "principles" are lengthy and intricate, but it is safe to conclude generally that a firm may be blacklisted if it trades with Israel or if it has a relationship with a firm that trades with Israel. *See* stipulation, exh. A, General Principles for the Boycott of Israel (1972), pp. 23-80. The ban on dealing with blacklisted companies has included bans on the importation of products manufactured by, or products containing components manufactured by, such companies. Decisions to blacklist a company are made haphazardly, however, and there are several factors that may result in continued trade with a company despite activity that could be deemed inconsistent with boycott principles. Stipulation, ¶ 23.

"Israel is a country friendly to the United States and is not itself the object of any form of boycott pursuant to United States law or regulation." Stipulation, ¶ 7. In the mid-1970's, Congress became concerned about Arab efforts to pressure American companies into participating in the boycott of Israel; several examples of such pressure were cited. *See* S.Rep.No.95—104, 95th Cong., 1st Sess. 16-18 (1978) *(Senate Report);* Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Report of the Arab Boycott and American Business* 10-11, 41-42 (Subcomm. Print 1976) *(Boycott Report).*

Congress eventually enacted anti-boycott legislation as an amendment to the Export Administration Act. *See* Pub.L.No.95-52, 91 Stat. 235 (1977); the anti-boycott rules were reenacted as part of the Export Administration Act of 1979, Pub.L.No.96-72, 93 Stat. 503 (codified at 50 U.S.C.App. § 2401 *et seq.* (Supp. III 1979)). Congress was assisted in the preparation of this legislation by representatives of American business, including the Business Roundtable, and representatives of several American Jewish organizations. *See Senate*

Report, p. 78; H.R.Rep.No.95-190, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 362, 366 *(House Report)*. The defendants in this action are the four highest ranking officials of the United States charged with enforcing the act. Their enforcement duties are set forth in the stipulation. *Id.* at ¶¶ 10-13.

Briggs & Stratton is a manufacturer of internal combustion engines; its engines are incorporated as power components in the end products of other manufacturers. Mr. Hamilton is vice-president for international sales for Briggs. Briggs does not manufacture or sell end products; it only manufactures components for end products. Thus the vast majority of its sales are to end product manufacturers who place the Briggs engines into their products.

Briggs' customers usually manufacture their products in large quantities using assembly line techniques. Their products are designed for a particular engine model and the design is not readily alterable. The parties stipulate:

> "Manufacturers in Australia, England, France, Germany, Japan, the United States and other countries sell products powered by Briggs engines to customers all over the world. The Arab countries are a segment and only a minor volume segment of this worldwide market. Because Briggs has been placed on some Arab country blacklists, and because of the standardization by its customers on a particular engine model, a number of its customers have notified it that they can no longer use its engines as components of products they will ship not only to the Arab countries but to all other countries as well." Stipulation, ¶ 4.

The parties also agree that there are other, foreign manufacturers of engines with sufficient capacity to supply the foreign market for these engines.

In May, 1977, Briggs received a letter from Georges A. K. Kabbabe, a distributor of Briggs' products in Syria. Stipulation, exh. B. Mr. Kabbabe wrote that a request for an import license for Briggs' products had been refused because Briggs

was on a blacklist. He enclosed a letter from the Syrian "Economical Department" that contained seven items which Briggs was to answer. The translation of the seven items reads:

> "1—Has the company now or in the past main or branch factories or combinating factories in Israel.
>
> "2—Has the company now or in the past general offices in Israel for its regional or international works.
>
> "3—Has it grant now or in the past the right of utilizing its name or trade marks or patents to persons or establishments or Israel works inside or outside Israel.
>
> "4—Does it share in or own now or in the past shares in Israel works or establishments inside or outside Israel.
>
> "5—Does it now or did it offer in the past any technical assistance to any Israeli work or establishment.
>
> "6—Does it represent now or did it represent in the past any Israel establishment or work inside or outside Israel.
>
> "7—What are the companies which it shares in or with, their nationality and the size or rate of this share." Stipulation, exh. C.

Briggs responded to the letter, answering all seven questions in the negative. *See* stipulation, exh. D. This response was eventually not accepted, however, for Briggs had failed to have its response authenticated by an Arab consular officer, as the letter required. *See* stipulation, exh. E. The parties agree that by the time Briggs received the request for authentication, the regulations challenged at bar prohibited Briggs from responding. Stipulation, ¶ 15.

Subsequent to its failure to return the authenticated response to the questionnaire, Briggs was blacklisted by Syria, Saudi Arabia, Bahrain, Oman, and Kuwait, all members of the Arab League. *See* stipulation, exhs. F & I. Briggs believes that it was blacklisted because of its failure to answer the questionnaire. Stipulation, ¶ 17. This is consistent with the Arab League's General Principles, *see* stipulation, exh. A;

¶ 15, First, g; p. 24. Briggs has been removed from the blacklist, however, and its products are currently accepted in all Arab League states. Stipulation, ¶ 18 and exhs. G & H.

The government acknowledges that the effect on Briggs of being blacklisted is significant:

> "Briggs' sales to persons who in turn export their products incorporating Briggs' engines to states which are members of the League of Arab States amounted to in excess of $15,000,000 in Briggs' most recently completed fiscal year ended June 30, 1980. Briggs believes that such sales for the fiscal year ending June 30, 1981 would exceed $15,000,000 but for the fact that some members of the League of Arab States have blacklisted Briggs. Briggs is making active efforts further to increase such sales and believes that there are good prospects for such increases. Such sales are profitable and currently account for the employment of in excess of 100 persons by Briggs in the United States. . . ." Stipulation, ¶ 1.

This litigation focuses on specific provisions of the anti-boycott legislation and the regulations implementing it. The crucial portion of the statute reads:

> "(a)(1) . . . [T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:
>
> * * * * * *
>
> "(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from

having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary [of Commerce]." 50 U.S.C.App. § 2407.

The parties have stipulated:

"Commerce Department officials have advised . . . Briggs that . . . any answer made by . . . Briggs which is responsive to the request [of the Syrian Economical Department] would contravene the Regulations herein described and that defendants would, upon learning that any information had been furnished by Briggs or on its behalf, in contravention of the Regulations, so construed, seek to impose one or more of the . . . penalties [described in paragraphs 10-12]." Stipulation, ¶ 14.

II. THE REGULATIONS' PRESUMPTION OF INTENT

The plaintiffs primarily object to the regulations promulgated by the Commerce Department on the issue of intent. These regulations read:

"(e) *'Intent'*. (1) Part 369 prohibits a United States person from taking or knowingly agreeing to take certain specified actions with intent to comply with, further, or support an unsanctioned foreign boycott.

"(2) A United States person has the intent to comply with, further, or support an unsanctioned foreign boycott when such a boycott is at least one of the reasons for that person's decision whether to take a particular prohibited action. So long as that is at least one of the reasons for his action, a violation occurs regardless of whether the prohibited action is also taken for non-boycott reasons. Stated differently, the fact that such action was taken for legitimate business reasons does not remove that action from the scope of this part if compliance with an unsanctioned foreign boycott was also a reason for the action.

"(3) Intent is a necessary element of any violation of this part. It is not sufficient that one take action that is specifically prohibited by this part. It is essential that one take such action with intent to comply with, further, or

support an unsanctioned foreign boycott. Accordingly, a person who inadvertently, without boycott intent, takes a prohibited action, does not commit any violation of this part.

"(4) Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established.

"(5) Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

"(6) Actions will be deemed to be taken with intent to comply with an unsanctioned foreign boycott if the person taking such action knew that such action was required or requested for boycott reasons. On the other hand, the mere absence of a business relationship with a blacklisted person or with or in a boycotted country does not indicate the existence of the requisite intent.

"(7) In seeking to determine whether the requisite intent exists, all available evidence will be examined." 15 C.F.R. § 369.1(e).

Following this regulation are "Examples of Intent"; number (viii) appears to describe the Briggs situation almost exactly.

Briggs argues that the intent regulations "establish a conclusive presumption of wrongful intent contrary to the plain language of the statute and without authority of law, and they interpret the statute in a manner contrary to Congress' in-

tent." Plaintiffs' brief, filed August 24, 1981, p. 15. I will pass the issue of the nature of the presumption for the moment, in favor of addressing the issue of whether the regulations improperly interpret the statute.

Briggs argues that the regulations read the intent element out of the statute, making the answering of a questionnaire a violation, even though Briggs does not have the "intent to comply with, further, or support the boycott." Briggs points to paragraph 21 of the stipulation, part of which reads:

> "Briggs has in the past and intends in the future to trade with persons in Israel and in all other respects conduct its business without regard to such purported 'General Principles [for the Boycott of Israel].' "

Three versions of the act in question were considered by Congress; two were Senate bills, one was in the House. At the time, there was concern that a company might violate the statute by some inadvertent act. *See Arab Boycott: Hearings on S. 69 and S. 92 before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 279 (1977) *(Senate Hearings); Extension of the Export Administration Act of 1969: Hearings and Markup before the House Comm. on Int'l Relations*, 95th Cong., 1st Sess. 265 (1977) *(House Hearings)*. The House version and one Senate version did not use the word "intent"; representatives of the executive branch took the position that the three bills provided the same protection against inadvertent violations. *Senate Hearings*, p. 458; *House Hearings*, p. 238. The Senate Committee on Banking, Housing, and Urban Affairs issued a favorable report on the Senate version that used the intent language, *Senate Report*, pp. 37, 61; this version eventually became the challenged portion of the statute.

In the report expressing approval of the present language, the Senate committee made clear that it wished to prohibit the conduct described at bar.

> "[The act] prohibits furnishing information about whether any person has, has had, or proposes to have any business

relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person known or believed to be restricted from having any business relationship with or in the boycotted country. The purpose of this provision is to prohibit U.S. persons from supplying information about whether they have business dealings with boycotted countries or blacklisted persons where such information is supplied with intent to comply with, further, or support a boycott. However, nothing in paragraph 4A(a)(1) is to prohibit the furnishing of normal business information in a commercial context as defined by the Secretary of Commerce.

"The most common example of prohibited information in the present context is a boycott questionnaire designed to elicit information about dealings with the boycotted country or blacklisted persons. The boycott questionnaire typically has no legitimate business purpose. It is intended to establish categories of eligiblity for dealings with the boycotting country based on the subject's dealings with third parties. This provision prohibits the supply of that information in such a context." *Senate Report*, pp. 39-40.

The above plainly states congress' meaning when it included the "intent" language in the statute. The plaintiffs maintain that answering a boycott questionnaire does not manifest intent to support the boycott if the person supplying the information does not agree with the boycott and does not intend to abide by it. However, I believe that Congress viewed answering a questionnaire from the boycott office as acting with intent "to comply with the boycott" by supplying the boycott officials with information. The regulations promulgated are consistent with Congress' meaning and the statute enacted. The committee report also states:

"Intent to comply with a boycott could be presumed, subject to rebuttal, where from all the circumstances it is reasonably clear that the information is sought for boycott enforcement purposes. The questionnaire, which on its face, or in the circumstances in which it is supplied, is designed only to elicit information about whether one has

> dealings with blacklisted persons or boycotted countries presents the clearest case. On the other hand where the information is sought in a context which does not make it reasonably clear that the purpose is boycott related, no illegal intent should be presumed. In a specific case, all the facts and circumstances, including ordinary commercial practice, would govern." *Senate Report*, p. 40.

The plaintiffs argue that the effect of the regulations on intent is at odds with the premises of the act. The anti-boycott provisions amended the Export Administration Act; the plaintiffs argue that the overall act stresses the importance of United States exports. To that end, the President must, prior to the imposition of export controls for foreign policy or national security purposes, consider whether the same goods are available from foreign suppliers; if they are, the President must specifically find that the controls are necessary. 50 U.S.C. App. § 2403(c); *see* 50 U.S.C.App. §§ 2404(f) and 2405(g).

While the promotion of the export of American goods is certainly one goal of the EAA, it is not the only one. Congress included a detailed "declaration of policy" in the act. 50 U.S.C.App. § 2402. Congress stated that it is the policy of the United States

> ". . . to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person." 50 U.S.C.App. § 2402(5)(B).

The Commerce Department regulations are consistent with this express policy to require persons to refuse to furnish information which would have the effect of furthering a boycott against a nation friendly to the United States. Thus the regulations are not inconsistent with the policies of the act.

The plaintiffs argue that the regulations state a conclusive presumption of intent which violates the principle that the

government must prove every element of a criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When intent is an element of the crime charged, its existence is a question left to the trier of fact. *Morissette v. United States*, 342 U.S. 246, 274, 72 S.Ct. 240, 255, 96 L.Ed. 288 (1952).

The government argues that the plaintiffs lack standing to raise this issue because "Briggs has not alleged that it is being criminally prosecuted by the Government for violating the Act, or that it has been threatened with criminal prosecution." Government's brief, filed November 4, 1981, p. 26. The parties have stipulated that if Briggs answered the questionnaire it would violate the regulations and that the defendants would seek to impose sanctions. Stipulation, ¶ 14, quoted *ante*. The parties have also stipulated: "Briggs believes it is necessary to and desires to answer and would answer the [questionnaire] if it were not that it fears being subjected to the penalties set forth in [50 U.S.C.App. § 2410]." Stipulation, ¶ 16. These sanctions include criminal and administrative penalties. I believe that the stipulated facts present a sufficient threat of prosecution to render the above argument of the government groundless. *See Craig v. Boren*, 429 U.S. 190, 192-97, 97 S.Ct. 451, 454-56, 50 L.Ed.2d 397 (1976); *Steffel v. Thompson*, 415 U.S. 452, 458-60, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974).

However, more is required than a threat of prosecution. The plaintiffs challenge the regulations' presumption of intent. The Supreme Court has stated:

> "Inferences and presumptions are a staple of our adversary system of fact-finding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact-finder's freedom to assess the evidence independently.

> Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster County Court v. Allen*, 442 U.S. 140, 156 [99 S.Ct. 2213, 2224, 60 L.Ed.2d 777] (1979) (citations omitted).

The Court also stated that a litigant's standing to advance certain arguments depends on the nature of the presumption challenged. *Id.*

There are several types of presumptions, the constitutionality of which differs depending on the burden they place on the defendant. *See Ulster County Court, supra*, at 157-60, 99 S.Ct. at 2224-26; *Sandstrom v. Montana*, 442 U.S. 510, 517-19, 99 S.Ct. 2450, 2455-56, 61 L.Ed.2d 39 (1979). The analysis of a presumption's validity can turn on the inclusion of even a few prefatory words affecting the defendant's burden. *Compare Sandstrom, supra, with Pigee v. Israel*, 670 F.2d 690 (7th Cir. 1982). In assessing the type of presumption involved, "the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it." *Ulster County Court, supra*, at 157-59 n. 16, 99 S.Ct. at 2224-26 n.16. The Court in *Ulster County Court* in affirming the use of a presumption closely analyzed how the presumption was presented to the jury. *Id.* at 160-63, 99 S.Ct. at 2226-27.

Viewed in this light, the issue is less whether Briggs has standing, but whether analysis of the presumption is premature at this time. The presumption has not been presented to any factfinder as part of a case to be decided. There is no record of jury instructions or other matters to evaluate whether the presumption was presented in the form of a conclusory, mandatory, or permissive presumption. Such a record is crucial in evaluating the constitutionality of the presumption. I believe that this record is not sufficiently developed to conduct the analysis adequately.

The question is complicated by the presence of administrative sanctions, however. It may be that the administrative process will apply the presumption as stated, without any further embellishment. Thus there would be no further record. Given this possibility, and in the interest of judicial economy, I will address the issue of the constitutionality of the presumption as it now stands.

Much of the regulation on intent is simply a modified version of the jury instruction on intent that is frequently used in the federal courts. *See Devitt & Blackmar*, Federal Jury Practice and Instructions, § 14.13. The plaintiffs primarily object to section 369.1(e)(5) (quoted above). That portion first states that the reason or purpose of the accused "can be proved by circumstantial evidence." It then follows with an example of how that reason or purpose can be inferred. The elemental act, intent to comply with a boycott, is presumed from proof of the basic fact, knowingly supplying information in response to a request to supply boycott information prohibited by the act. The fact that the supplier of the information does not otherwise agree with the boycott is "irrelevant."

I believe that this presumption is proper. The regulation fulfills the congressional purpose to prohibit the flow of information to boycott authorities. I also find rational a presumption of intent to comply with a boycott from proof that the informant knowingly supplied prohibited boycott information, knowing it was sought for boycott purposes. *See Ulster County Court, supra*, at 163-67, 99 S.Ct. at 2227-29. In that regard, the presumption is not unlike other presumptions found in the federal jury instructions. *See Devitt & Blackmar*, § 31.07 (intent to avoid prosecution); § 52.09 (specific intent to pass counterfeit money); § 56.07 (intent and motive in Hobbs Act violations). Section 369.1(e)(7) requires consideration of all available evidence; juries are similarly instructed regarding the good faith belief of one accused of income tax evasion. *Devitt & Blackmar*, § 35.12. I do not believe the presumption places an improper burden on one charged with violating the act. Accordingly, I reject the plaintiffs' contention that the regulation's presumption of intent is unconstitutional.

III. THE RATIONALITY OF THE REGULATORY SCHEME

The plaintiffs contend that the Commerce Department regulations are irrational as they apply to Briggs and therefore void. Briggs argues that the boycott authorities send out questionnaires haphazardly and seek information that either is not useful or is readily available from public sources. Briggs maintains that once a company fails to answer an inquiry, the boycott authorities consider whether that firm's products are readily available from other sources. If they are, the company is blacklisted. Thus Briggs argues that by prohibiting answers to such inquiries, the Commerce Department has simplified the task of the boycotters and shifted commerce to foreign competitors. Briggs argues that this is irrational.

The government argues that the regulations prohibiting the furnishing of information cannot be viewed in isolation. As the *Senate Report* states:

> "[T]he committee strongly believes that the United States should not acquiesce in attempts by foreign governments through secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. Accordingly, the bill reported by the committee directly attacks attempts to interfere with American affairs while creating mechanisms for more subtle and flexible pressure against the other dimensions of foreign boycotts." *Id.* at 21.

A major provision of the act is the "refusal to deal" section, 50 U.S.C.App. § 2407(a)(1)(A), which authorizes the issuance of regulations prohibiting Americans from intentionally refusing to do business with entities associated with boycotted countries. Congress intended the prohibition on passing information to reinforce this provision and others.

> "The prohibition on furnishing information about another person's race, religion, sex, or national origin would reinforce the anti-discrimination provisions of the bill. Similarly, the prohibition on furnishing information about who does and proposes to do business with a boycotted

> country or blacklisted person would bolster the refusal to deal provisions of the bill. Both are necessary to prevent a boycotting country from using U.S. persons to supply information necessary to boycott enforcement." *Senate Report*, p. 25.

Questionnaires such as that received by Briggs were a major focus of Congress' prohibition on the passing of information. *See Senate Report*, pp. 39-40 (quoted *ante*).

Congress recognized that the information sought would often be available from other sources, but it determined that the prohibition should include such matters.

> "Such information may very well be available through other sources, including information innocently supplied by U.S. firms in the course of ordinary business transactions. And in that regard the bill does explicitly permit the furnishing of normal business information in a commercial context. . . . But there is little justification for permitting U.S. persons to supply information when they know it is being sought for boycott enforcement purposes. To do so would be to sanction active complicity in boycott implementation." *Senate Report*, p. 25.

Considering this context, I cannot find the Commerce Department regulations to be an irrational implementation of the legislation. The regulations adequately translate Congress' concerns about cutting off the flow of information to boycotters. As a result, Briggs did not answer a questionnaire from the boycott office, the only purpose of which was to seek information to aid the boycott effort. I believe that the regulations are "reasonably related to the purposes of the . . . legislation." *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969). Accordingly, they do not violate the due process clause.

Briggs oversimplifies the case by arguing that failure to answer the questionnaire triggers a blacklisting. The parties have indeed stipulated that Briggs was blacklisted subsequent to its failure to answer the inquiry. Stipulation, ¶ 16. However, Briggs had a problem exporting to Syria prior to receiving the questionnaire, *see* stipulation, exh. B, and it has also been

taken off of the blacklist, even though it has not answered the questionnaire. At the time of the stipulation, its products were being accepted throughout the nations of the Arab League. Stipulation, ¶ 18. Thus the effect of the regulations on American trade is not nearly so cut and dried as Briggs argues.

I also reject Briggs' argument that the regulations permit a firm to supply information in the absence of a questionnaire that it cannot supply if it gets one. Example (ix) following the intent regulation reads:

> "U.S. company A is on boycotting country Y's blacklist. In an attempt to secure its removal from the blacklist, A wishes to supply Y *information which demonstrates that A does at least as much business in Y and other countries engaged in a boycott of X as it does in X.* A intends to continue its business in X undiminished and in fact is exploring and intends to continue exploring an expansion of its activities in X without regard to Y's boycott.
>
> "A may furnish the information, because in doing so it has no intent to comply with, further, or support Y's boycott." 15 C.F.R. § 369.1(e), Examples of Intent. (Emphasis added).

Briggs' interpretation of this example goes to far. The example merely permits a company on its own initiative to demonstrate non-discriminatory conduct. *See* 15 C.F.R. § 369.1(e), Note to the examples. Example (ix) cannot be read to condone a company unilaterally providing a variety of information to a boycott agency. For example, I believe that the regulations quite reasonably prohibit a company from currying favor with boycott officials by unilaterally telling them that it will not trade with the boycotted country.

IV. THE PLAINTIFFS' NINTH AMENDMENT RIGHTS

The totality of the plaintiffs' argument under the ninth amemdment is:

> "Briggs believes its fifth amendment right is well-recognized. However, should the Court find otherwise, Briggs' right to pursue its trade and profit from it is

worthy of ninth amendment protection." Plaintiffs' brief, filed August 24, 1981, p. 21 n.4.

I am not persuaded by Briggs' argument under the fifth amendment. Similarly, I fail to perceive any merit to the above barebones assertion of ninth amendment protection.

V. THE PLAINTIFFS' FREE SPEECH RIGHTS

The plaintiffs contend that section 2407(a)(1)(D) violates the first amendment because it does not permit the plaintiffs to answer truthfully the boycott questionnaire. Briggs argues that the regulations against this flow of information restrict its commercial speech and thus are inconsistent with recently articulated first amendment principles regarding such speech.

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1826, 48 L.Ed.2d 346 (1976). Most, if not all, of the cases considering first amendment protections of commercial speech have considered various aspects of advertising. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Central Hudson, supra; Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia Pharmacy Board, supra; Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). The Court has explained: "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board, supra*, 425 U.S. at 770, 96 S.Ct. at 1829.

The Court has not extended full first amendment protection to commercial speech.

> "[O]ur decisions have recognized 'the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson, supra*, 447 U.S. at 562-63 [100 S.Ct. at 2349-50], quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 [98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444] (1978) (other citations ommitted).

The Court has also recognized: "Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests." *Friedman v. Rogers*, 440 U.S. 1, 10-11 n.9, 99 S.Ct. 887, 894-895 n.9, 59 L.Ed.2d 100 (1979).

The claim to protected first amendment rights in the free flow of information seems out of place in the context of the instant suit. The plaintiffs do not challenge a statute that prohibits them from presenting the public with price and product information about the engines that Briggs produces; the statute is no bar to the free flow of business information to the purchasers of Briggs' products. "Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context. . . ." 50 U.S.C.App. § 2407(a)(1)(D); *see* 15 C.F.R. § 369.2(d)(3) & (4). Instead the legislation is designed to interrupt the flow of information to those who conduct an economic boycott against a nation friendly to the United States, a boycott of which Congress does not approve. In this context the admonition to be cautious about a first amendment claim must be heeded.

There are a variety of laws that prohibit the exchange of information in certain contexts. *See Ohralik, supra*, 436 U.S. at 456, 98 S.Ct. at 1918, and the cases cited therein. As *Ohralik* states:

> "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 456 [98 S.Ct. at 1918].

Briggs contends that the Court has held that regulation of commercial speech must satisfy the four-part test of *Central Hudson*. The Court stated:

> "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564 [100 S.Ct. at 2350].

Briggs contends that its speech is not misleading and concerns lawful activity, since the act does not make boycotts unlawful. However, if responses to boycott questionnaires are "a subject only marginally affected with First Amendment concerns," then the "conduct is subject to regulation in furtherance of important state interests." *Ohralik, supra*, 436 U.S. at 459, 98 S.Ct. at 1920.

The state interest here is substantial, involving delicate foreign policy questions and the interest of the government in forestalling attempts by foreign governments to "embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to Amer-

ican values and traditions." *Senate Report*, p. 21. Congress concluded that supplying information to boycott authorities has no legitimate business purpose and should be prohibited. I find the governmental interests to be substantial and more than sufficient to outweigh the marginal applicability of the first amendment.

I will also address the latter two elements of the *Central Hudson* test. The regulations prohibit compliance with solicitations from boycott authorities. Thus the regulations prevent American companies from being used as agents of the boycotting countries, and the regulations also advance the stated interest in keeping Americans out of the boycott struggle. It may be that in some situations the regulations do not fully accomplish that goal, and the company will be blacklisted anyway. As I noted above, that result is not a foregone conclusion. What can be safely concluded, however, is that the rule has directly advanced the governmental interest by preventing information from flowing to the boycotters.

The legislation is not more restrictive than necessary. The statute carefully excludes from its reach information transmitted in the normal business context. 50 U.S.C.App. § 2407(a)(1)(D); *see* 15 C.F.R. § 369.2(d)(3) & (4). The act sets up a bright-line division between that type of speech and answers to inquiries from boycott officials. To attempt to parse the prohibitions to exclude answers that transmit information readily available elsewhere, or information that arguably is not useful to the boycotters would be a difficult, if not impossible, regulatory task. Substantial questions of interpretation immediately suggest themselves; the regulatory process would be vastly complicated, frustrating the governmental interest. I find that the distinctions made are reasonable and that the governmental interest would not be served by any more limited restrictions.

VI. TAKING PROPERTY WITHOUT COMPENSATION

[9] Briggs argues that because the regulations cause Briggs to be blacklisted, and thus affect its worldwide sales,

the government has totally destroyed Briggs' rights to its foreign trade. Briggs likens the effect to a restriction on private property which " 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980), quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

In *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), the Supreme Court held that the denial of one traditional property right, where the others were not disturbed, did not always amount to a taking. In *Andrus*, there was no physical invasion or restraint on the property in question; the regulation only prohibited the sale of the property. The Court did not find dispositive the fact that the regulations prevented the most profitable use of the property.

> "When we review regulation, a reduction in the value of property is not necessarily equated with a taking. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.* at 66 [100 S.Ct. at 327] (citations omitted).

The reed is equally slender here. The regulations apply to all Americans equally. It is possible that they have a somewhat greater impact on Briggs than they do on others, but that does not constitute a taking. Briggs has lost some profits because it has lost some sales, but its property has not been seized or restrained by the government. There is no restriction by the challenged regulation on Briggs' efforts to export its products. In prohibiting Briggs from answering certain questions, the government has not taken Briggs' property in violation of the fifth amendment.

VII. CONCLUSION

The defendants recently filed a motion with the Judicial Panel on Multidistrict Litigation, and notice of such filing was received by this court on May 7, 1982. No action has yet been

taken by the panel, and thus there are applicable the provisions of Rule 16, Rules of Procedure for the Judicial on Multidistrict Litigation, as authorized by 28 U.S.C. § 1407(f), which provide that the mere pendency of such a motion does not affect either this court's jurisdiction or its pretrial proceedings.

The challenged regulations do not interpret the statute in a manner contrary to what Congress intended. While consideration of the presumption in the regulations is, arguably, premature at this juncture, I believe that the presumption is rational and not unconstitutional. I find the regulatory scheme as a whole to be rational. Also, I find no merit to the plaintiffs' perfunctory argument under the ninth amendment. In addition, I conclude that the regulations do not impermissibly abridge the plaintiffs' free speech rights. Finally, the government has not taken Briggs' property without compensation.

Therefore, IT IS ORDERED that the motion of the plaintiffs for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendants' motion for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that this action be and hereby is dismissed upon its merits.

APPENDIX D

BRIGGS & STRATTON CORPORATION, a Delaware corporation, and Michael Hamilton, Plaintiffs,

v.

Malcolm BALDRIGE, Secretary of the United States Department of Commerce, Lionel H. Olmer, Under Secretary for International Trade, United States Department of Commerce, William French Smith, Attorney General of the United States, and Ronald Reagan, President of the United States, Defendants.

No. 80-C-721.

United States District Court,
E. D. Wisconsin.

Aug. 4, 1982.

Quarles & Brady by Elwin J. Zarwell, Samuel J. Recht, Carolyn A. Gnaedinger, Joan P. Clark, Milwaukee, Wis., for plaintiffs.

Joseph P. Stadtmueller, U.S. Atty., Milwaukee, Wis., Cecil Hunt, Asst. Gen. Counsel, Neil H. Koslowe, Sp. Counsel, Pamela P. Breed, Asst. Gen. Counsel, Dept. of Justice, Washington, D.C., for defendants.

DECISION and ORDER

MYRON L. GORDON, District Judge.

The plaintiffs have moved for reconsideration of this court's order dated May 10, 1982, granting summary judgment in favor of the defendants and dismissing the plaintiffs' action. 539 F.Supp. 1307. The present motion is based on the plaintiffs' claim that in that order I held that the defendants had not abridged the plaintiffs' *commercial* speech but I failed to rule on whether the plaintiffs' first amendment rights to publish *conventional* speech had been impinged.

The defendants present two threshold questions, neither of which is challenged by the plaintiffs. First, the defendants note that the plaintiffs' motion for reconsideration is brought under Rule 59, Federal Rules of Civil Procedure, which does not contemplate relief then the issue presented could have been, but was not, raised previously. *Echevarria v. U.S. Steel Corp.*, 392 F.2d 885, 892 (7th Cir. 1968). Secondly, the defendants point out that Briggs, in its original briefs, contended that in responding to the boycott questionnaire, it was engaging in "a straightforward act of commercial speech." Thus, the defendants accuse Briggs of blatant inconsistency in now suggesting that their conduct was not commercial speech but rather was also designed to accomplish other purposes, including that of informing the public of the scope of its business.

The defendants, in their reply brief, have not responded to either of the threshold questions referred to above. Nevertheless, I prefer to advert to the merits of the plaintiffs' motion.

Although they now claim that their response to the boycott questionnaire was protected "conventional" speech, it is clear to me that the plaintiffs were more accurate when they previously asserted that their responses were "commercial" speech. True, I did not purport to resolve the issue from the standpoint of "conventional" speech, primarily because the plaintiffs then argued that the issue involved was protected commercial speech. In their present stance, the plaintiffs not only contradict their previous position, but, more seriously, they defy good sense. It is irresistibly obvious that the plaintiffs' responses to the questionnaire were calculated to further Briggs' business relations with certain countries rather than to enlighten the general public, or to edify society.

My conclusion that the case at bar does in fact involve only commercial speech makes it unnecessary to resolve whether the plaintiffs' alleged conventional speech rights were abridged. However, were the latter question germane, I would find no constitional intrusion. Similarly, although the two threshold questions need not be decided, I believe the defendants' position correct on both of them.

Therefore, IT IS ORDERED that the plaintiffs' motion for reconsideration be and hereby is denied.

APPENDIX E

Opinion by Judge Eschbach

JUDGMENT ORAL ARGUMENT

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 24, 1984

Before Hon. WILLIAM J. BAUER, *Circuit Judge*, Hon. JESSE E. ESCHBACH, *Circuit Judge*, and Hon. WILLIAM J. CAMPBELL, *Senior District Judge.**

Nos. 82-2112, 82-2392

BRIGGS & STRATTON CORPORATION and MICHAEL HAMILTON,
Plaintiffs-Appellants,

vs.

MALCOLM BALDRIGE, Secretary of the United States Department of Commerce, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 80 C 721
Judge Myron L. Gordon.

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*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

No. 83-1258
THE TRANE COMPANY, *et al.*,

Plaintiffs-Appellants,

vs.

JUANITA MORRIS KREPS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 78 C 413
Judge Robert W. Warren.

These causes came before the Court for decision on the record from the United States District Courts for the Eastern and Western Districts of Wisconsin, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the said District Courts in these causes appealed from be, and the same are hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

Civil Action No.
78 C 413

THE TRANE COMPANY, *et al.*,
Plaintiffs,

v.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Defendants.

STIPULATION OF FACTS

All of the parties to this action hereby stipulate to the following facts:

1. Plaintiff The Trane Company ("Trane") is a Wisconsin corporation with its headquarters at 3600 Pammel Creek Road, La Crosse, Wisconsin 54601. Trane is a manufacturer of air conditioning, refrigeration, and heat transfer equipment. Trane presently exports its products to Kuwait, Saudi Arabia, Bahrain, Iraq, Lebanon, Libya, Oman, Qatar, Syria and United Arab Emirates, all members of the League of Arab States that enforce, in varying degrees, the three aspects of the Arab boycott of Israel described in paragraphs 9 and 10 herein. Trane's export sales to these members of the League of Arab States have for each of the past several years amounted to more than $15 million, and Trane has substantial investments, including offices, other facilities and equipment and investments in ongoing contracts, within the Arab states. Annual sales to Kuwait are substantial; actual dollar amounts of such sales have been supplied by Trane under protective order on December 15, 1978, and September 2, 1980, in response to Defendants'

First Set of Interrogatories, interrogatory number 1(d). Such sales are profitable and currently account for the employment of more than 100 persons by Trane in the United States, principally at its manufacturing plant in La Crosse, Wisconsin, and also at its plants in Scranton, Pennsylvania, Lexington, Kentucky, and Clarkesville, Tennessee.

2. Trane currently is making active efforts further to increase its sales to members of the League of Arab States. Air-conditioning, refrigeration, and heat transfer equipment similar to those manufactured and exported by Trane is available to the Arab states, in sufficient quantity to meet their demand, from manufacturers in foreign countries that have no legal restrictions on complying with requests for information from Arab boycott authorities. Nevertheless, because of the competitive nature of its products and services, Trane has good prospects for increased sales unless it is blacklisted by one or more of the Arab states.

3. Plaintiff United Technologies Corporation (which together with its subsidiaries is referred to as "UTC") is a Delaware corporation with headquarters at United Technologies Building, Hartford, Connecticut 06101. UTC is a manufacturer of jet engines, helicopters, elevators and escalators, air-conditioning equipment, and other products within three principal lines of business — Power, Flight Systems, and Industrial Products and Services. UTC presently exports its products, directly, through end product manufacturers, and through other purchasers, to Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Syria, Saudi Arabia, United Arab Emirates, and Yemen Arab Republic, all members of the League of Arab States that enforce, in varying degrees, the three aspects of the Arab boycott of Israel described herein. UTC's export sales to Arab League member states for each of the last three years has amounted to more than $260 million, and UTC has substantial investments, including offices, other facilities and equipment and investments in ongoing contracts, within the Arab states. Such sales are profitable and currently account for the employment of approximately 4,000 persons by UTC in the United States, principally at manufacturing plants in Connecticut, New York and Florida.

4. UTC currently is making active efforts further to increase its sales to members of the League of Arab States. Products similar to all of those manufactured and exported by UTC are available to the Arab states, in sufficient quantity to meet their demand, from manufacturers in foreign countries that have no legal restrictions on complying with requests for information from Arab boycott authorities. Nevertheless, because of the competitive nature of its products and services, UTC has good prospects for increased sales, unless it is blacklisted by one or more of the Arab states.

5. Plaintiff Maurice Bouchard ("Bouchard") is Vice President, Southern Hemisphere and Middle East, of Trane. He is a citizen of Wisconsin and resides at 2500 Hillcrest Drive, La Crosse, Wisconsin 54601. He is the official of Trane who in the ordinary course of business would respond to requests for information from countries which are members of the League of Arab States. He devotes a substantial portion of his working time to matters related to Trane's business with Arab countries, a substantial part, if not all, of which would be adversely affected if one or more Arab states to which Trane exports its products were to deny entry to those products. Bouchard believes that this in turn would be likely to cause the elimination or downgrading of his current position with a consequent loss to him of income and of opportunities for employment or advancement.

6. Plaintiff Nicholas Tomassetti is Vice President, Marketing and Customer Support, of the Power Group/Commercial Products Division of UTC with responsibility for the Middle East and Africa Region. He is a resident of Ashford, Connecticut, and a citizen of the United States. He is an official of UTC who in the ordinary course of business would respond to requests for information from countries which are members of the League of Arab States. He devotes a substantial portion of his working time to matters related to UTC's business with Arab countries, a substantial part, if not all, of which would be adversely affected if one or more Arab states to which UTC exports its products were to deny entry to those products. Tomassetti believes that this in turn would be likely to cause the

elimination or downgrading of his current position with a consequent loss to him of income and of opportunitites for employment or advancement.

7. The League of Arab States is composed of 21 Arab states. On December 11, 1954 its council approved a resolution recommending an economic boycott of the State of Israel. Some time thereafter, the League of Arab States formed an organization called the Central Boycott Office, with headquarters currently in Damascus, Syria, which facilitates communications among the boycott offices of the individual boycotting states, gathers boycott-related information, investigates and administers certain aspects of the boycott, and makes decisions to recommend that certain persons or firms should be blacklisted by the participating Arab states.

8. Although some Arab states, including Kuwait, have published implementing boycott regulations while others have not, all Arab states that enforce the boycott of Israel represent that their boycott activities are governed by a document entitled "General Principles for Boycott of Israel" (June 1972, republished in Arabic in May 1977), published by the Central Boycott Office and the League of Arab States (Exhibit A hereto). However, each Arab state retains its sovereign rights over boycott activities, and in a significant number of cases these states have not applied the provisions of that document. The boycott of Israel has three general aspects: a primary boycott, a secondary boycott, and a tertiary boycott.

9. The primary boycott of Israel is currently enforced by 16 Arab states. These Arab states are Algeria, Bahrain, Democratic Republic of Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, and Yemen Arab Republic. The primary boycott of Israel involves a refusal by the governments of these countries to deal, and a prohibition on their residents from dealing, directly with, or in the goods of, Israel or Israeli firms.

10. The secondary and tertiary aspects of the boycott of Israel are enforced in varying degrees by 13 Arab states. These states are the same states that enforce the primary boycott excluding Morocco, Tunisia, and Algeria. The secondary boycott involves a refusal by the governments of these Arab states to deal, and a prohibition on their residents from dealing, with persons or firms, or in the goods or services of persons or firms, which, although not Israeli, have been "blacklisted" by boycott officials of these Arab states for engaging in certain activities which are set forth on pages 23-28 of the document entitled "General Principles for Boycott of Israel." The tertiary boycott involves a requirement by these governments that persons or firms not deal with blacklisted firms in certain circumstances.

11. Actions to blacklist a firm or person normally originate with boycott authorities in one of the 13 Arab states enforcing the secondary and tertiary aspects of the boycott, although they may originate with the Central Boycott Office. An investigation by the boycott office of an Arab state (a "local boycott office") may arise as a result of information coming to its attention indicating the possibility that the target firm or person may not be in conformance with the document entitled "General Principles for Boycott of Israel" or it may arise for no ascertainable reason. In the event the local boycott office is not satisfied as to the target's conformity with the document entitled "General Principles for Boycott of Israel," it may blacklist or warn the target, inform or direct other government agencies in the country to refuse to deal with the target, and/or propose that the Central Boycott Office in Damascus recommend that the target be blacklisted by the 13 Arab states that implement, in varying degrees, the secondary and tertiary aspects of the boycott. Alternatively, it may take no action whatsoever.

12. In the course of its investigation or in the course of gathering boycott-related information, the local boycott office may direct a series of written questions (in the form of a questionnaire) to the target either directly or through other parties, such as a local agent or representative, seeking formal written responses as to the target's business affiliations,

relationships with Israel, relationships with blacklisted persons or firms, and other matters. While there are significant variations in boycott enforcement practices among these 13 Arab states, the failure of a target to respond to such a questionnaire from a local boycott office within the prescribed time period, including any extensions which may be allowed, makes it more likely than not in each instance that the target will be blacklisted by the country originating the request and will be proposed to the Central Boycott Office for its recommendation concerning blacklisting in the other 12 states. Kuwait, for example, has often blacklisted the target for failing to respond to such questionnaires.

13. In the event a proposal for blacklisting is made to the Central Boycott Office, there is a reasonable likelihood that the Central Boycott Office will recommend the persons or firms should be blacklisted in all of the other 12 Arab states if the person or firm has failed to provide satisfactory formal written responses to information requested by a local boycott office or by the Central Boycott Office as to its business affiliations, relationships with Israel, relationships with blacklisted persons or firms and other matters. In the event the recommendation of the Central Boycott Office is that the person or firm should be blacklisted, it is more likely than not that blacklisting of the target will occur in at least some of the participating Arab states in which the person or firm conducts business and that such blacklisting will include all affiliated firms and persons known to boycott authorities, including directly and indirectly owned subsidiaries and parent firms.

14. In the event a person or firm is blacklisted in one or more of the 13 Arab states, the document entitled "General Principles for Boycott of Israel" provides that its products and services will be denied entry into such states.

15. On or about July 19, 1978, Trane and Bouchard received a letter from Abdulhamid Yousuf Al-Essa, the distributor of Trane's products in Kuwait, enclosing a letter and questionnaire (the "Kuwaiti questionnaire") from the Israel Boycott Office of the Customs Department of the Ministry of Communications of Kuwait. (All of these documents are

attached to Trane's and Bouchard's complaint.) This Kuwaiti letter and questionnaire constitute an official request for information from the government of Kuwait concerning Trane's business relationships and activities with respect to certain companies and with Israel or Israeli firms.

16. Trane and Bouchard are "United States persons" as defined in relevant provisions of the Export Administration Act of 1979 and interpreting regulations of the Commerce Department, and any responses by them to the Kuwaiti questionnaire would constitute activities in the interstate or foreign commerce of the United States as defined in said Act and regulations. Trane's and Bouchard's responding to the Kuwaiti questionnaire by furnishing the information sought therein is proscribed by said Commerce Department regulations, which are the subject of plaintiffs' challenge in this lawsuit.

17. The Kuwaiti letter directed that Trane answer the questionnaire and the questions posed therein within three months. Trane subsequently informed the Kuwaiti authorities that such response was prohibited by United States law and sought additional time to respond to the Kuwaiti inquiries. The Kuwaiti boycott authorities initially granted Trane two additional six-month periods in which to respond. At the end of that time Trane requested an indefinite extension of time in which to respond pending the resolution of this lawsuit. There has been no official response to this request, but Trane has received no notice that it has been blacklisted.

18. If called upon to testify, witnesses for Trane and Bouchard would testify that Trane officials have no knowledge of the reasons why the Kuwaiti boycott office submitted the questionnaire to Trane for answers. These witnesses would further testify that Trane officials believe that if they were permitted to give responsive answers to the Kuwaiti questionnaire and not otherwise violate the Export Administration Act of 1979 and Commerce Department regulations, Trane would be able to avoid blacklisting.

19. On or about October 29, 1980, UTC received a letter from Dr. Nourallah Nourallah, Secretary General of the Cen-

tral Boycott Office, containing several questions which inquire about whether UTC or any of its subsidiaries has ownership, licensing technical assistance, or other business relationships with Israel or Israeli firms, and what firms are owned by UTC or have ownership interests in UTC (the "Central Boycott Office questionnaire"). (This letter was attached to UTC's and Tomassetti's complaint.) This Central Boycott Office questionnaire directed that UTC answer the questions posed therein and return those answers to the Central Boycott Office within three months.

20. UTC and Tomassetti are "United States persons" as defined in the Export Administration Act of 1979 and interpreting Commerce Department regulations, and any responses by them to the Central Boycott Office questionnaire would constitute activities in the interstate or foreign commerce of the United States as defined in said act and regulations. UTC's and Tomassetti's responding to the Central Boycott Office questionnaire by furnishing the information sought therein is proscribed by the said Commerce Department regulations, which are being challenged in this lawsuit. UTC has so informed the Central Boycott Office and has sought additional time within which to respond to the Central Boycott Office questionnaire. UTC has been granted two additional six-month periods in which to respond to the Central Boycott Office questionnaire. UTC has not been notified that it would be denied an indefinite extension of time in which to respond pending the resolution of this lawsuit or that it has been blacklisted.

21. If called upon to testify, witnesses for UTC and Tomassetti would testify that, although the questionnaire states certain reasons, UTC officials have no knowledge why it was selected by the Central Boycott Office to receive the questionnaire. These witnesses would further testify that UTC officials believe that if they were permitted to give responsive answers to the questionnaire and not otherwise violate the Export Administration Act of 1979 and Commerce Department regulations, UTC would be able to avoid blacklisting.

22. Officials of the United States Department of Commerce have advised Trane and UTC that, under the facts as herein set forth, responsive information furnished by Trane or UTC to the Kuwaiti or Central Boycott Office questionnaires, respectively, would contravene the Department's regulations which are being challenged in this lawsuit, and that defendants could, upon learning that any responsive information had been furnished by Trane or UTC or on their behalf, in contravention of the regulations as so construed, seek to impose one or more of the statutory penalties provided for such violations.

23. The questionnaires received by Trane and UTC call for information which Trane and UTC would not be prohibited from communicating under any applicable federal or state law other than the portions of the Export Administration Act of 1979 and Commerce Department regulations challenged by plaintiffs in this lawsuit. Some of the information called for in the questionnaires is publicly available from diverse sources. If Trane and UTC were permitted to respond to the questionnaires, Arab Boycott officials would be able to satisfy their need, if any, for the requested information without the inconvenience or expense of consulting such public sources.

24. It has been reported that one reason U.S. companies have been sent questionnaires is that Arab boycott officials occasionally receive from a variety of sources, including foreign competitors of a U.S. company, purported information, true or otherwise, indicating that the U.S. company may be in violation of boycott principles.

25. Trane and Bouchard would answer the Kuwaiti questionnaire if Trane would not be subject to the penalties referred to above for making such a response. Trane and Bouchard are inhibited and restrained from answering because of their fear of the imposition of these penalties.

26. UTC and Tomassetti would answer the Central Boycott Office questionnaires if UTC would not be subject to the penalties referred to above for making such a response. UTC and Tomassetti are inhibited and restrained from responding because of their fear of the imposition of these penalties.

27. The document entitled "General Principles for Boycott of Israel," at page 24, lists as one of the actions by a company that will cause the company to be blacklisted: "If, within the period of warning, they refuse to reply to questions submitted to them with a view to clarifying their position and determining their relationship with Israel."

28. When an Arab government announces that a company has been placed on its blacklist, a reason for the blacklisting is not stated in the vast majority of cases. Occasionally, however, some Arab countries state a reason or reasons for a blacklisting action. As for those companies for which a reason or reasons are given for their blacklisting, some have been stated by one or more of the blacklisting states to have been blacklisted because of the company's failure to answer an official request for information such as the questionnaires received by Trane and UTC.

29. If called upon to testify, witnesses for the plaintiffs would testify that Trane and UTC are fearful that if they fail to respond to the Kuwaiti and Central Boycott Office questionnaires, respectively, they will be blacklisted and their goods banned in one or more of the Arab states in which they do business because of that failure to respond. These fears are based in part on communications Trane and UTC officials have had with Kuwaiti and Central Boycott Office officials, respectively, where they were told that action would be taken against them if the questionnaires were not answered and that U.S. law was not an acceptable justification for a failure to answer. Because the enforcement of the economic boycott of Israel by the various Arab states is somewhat haphazard, it is impossible to predict with certainty what action a particular member state will take in any specific circumstance. Nevertheless, the failure to answer an inquiry from an Arab boycott authority makes it more likely than not that the person or firm not responding will be blacklisted and have its products banned by one or more Arab states.

30. If Trane is blacklisted by members of the League of Arab States in which it does business, it is more likely than not that its goods will be denied entry by the blacklisting members.

If its goods are denied entry by member states in which it does substantial business, Trane will suffer adverse economic impact. Furthermore, such action might adversely affect that portion of Trane's workforce employed in the production and sales of such goods. It might also cause substantial personal, professional, and economic hardship for Bouchard.

31. If UTC is blacklisted by members of the League of Arab States in which it does business, it is more likely than not that its goods will be denied entry by the blacklisting members. If its goods are denied entry by member states in which it does substantial business, UTC will suffer adverse economic impact. Furthermore such action might adversely affect that portion of UTC's workforce employed in the production and sale of such goods. It might also cause substantial personal, professional, and economic hardship for Tomassetti.

32. Defendant Malcolm Baldrige is the duly appointed Secretary of Commerce of the United States. He is authorized to impose the sanctions specified in Section 11 of the Export Administration Act, 50 U.S.C. App. §2410, including civil penalties of up to $10,000 for each knowing violation of the Export Administration Act or the Regulations, and revocation or suspension of the authority to export goods. The President of the United States has also delegated to the Secretary certain power, authority, and discretion conferred upon him by the Export Administration Act, including the powers and duties to carry out prohibitions on the furnishing of information relating to foreign boycotts.

33. Defendant Lionel H. Olmer is the duly appointed Under Secretary for International Trade of the United States Department of Commerce. He is an "officer or employee of such department . . . specifically designated by the head thereof" within the meaning of Section 7(a) of the Export Administration Act, 50 U.S.C. App. §2410(c)(1), and as such may impose the civil sanctions provided for in Section 11(c) of the Export Administration Act for each violation of that Act or of the Regulations.

34. Defendant William French Smith is the duly appointed Attorney General of the United States. As such, he is charged with the enforcement of criminal sanctions under the Export Administration Act. These sanctions, as set forth in Section 11 of the Act, 50 U.S.C. App. §2410, include fines of not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisonment for not more than five years, or both, for a knowing violation of the Export Administration Act or the Regulations.

35. Defendant Ronald Reagan is the duly elected President of the United States. He is authorized under provisions of the Export Administration Act to effectuate the policies of the Export Administration Act, including those expressed in Section 3(5), 50 U.S.C. App. §2402(5), concerning the supply of information relating to a boycott. He is further directed under Section 8(a)(1) of the Export Administration Act, 50 U.S.C. App. §2407(a)(1), to issue rules and regulations interpreting the Export Administration Act.

36. The parties reasonably believe that since the Commerce Department regulations which are being challenged in this lawsuit first became effective in 1978: (a) there has not been any significant decline in the number of official requests for information being sent to American companies by Arab boycott officials, (b) there has not been any decline in the number of blacklisted American companies, and (c) total U.S. exports to members of the League of Arab States have substantially increased each year, although some U.S. companies have lost potential sales to members of the League of Arab States.

/s/ NEIL H. KOSLOWE	/s/ BRICE M. CLAGETT
NEIL H. KOSLOWE Counsel for Defendants	BRICE M. CLAGETT Counsel for Plaintiffs

Dated: March 8, 1982

APPENDIX G

Excerpts form the Export Administration Act of 1979, 50 U.S.C. App § 2401 et seq. (Supp. V 1981)

§ 2401. Congressional findings

The Congress makes the following findings:

(1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy.

(2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

(3) It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation's economy.

(4) The availability of certain materials at home and abroad varies so that the quantity and composition of United States exports and their distribution among importing countries may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States.

(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.

(6) Uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States.

(7) Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.

(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States.

(9) Minimization of restrictions on exports of agricultural commodities and products is of critical importance to the maintenance of a sound agricultural sector, to achievement of a positive balance of payments, to reducing the level of Federal expenditures for agricultural support programs, and to United States cooperation in efforts to eliminate malnutrition and world hunger.

§ 2402. Congressional declaration of policy

The Congress makes the following declarations:

(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the export of goods and technology which would make a significant contribution to the military

potential of any other country or combination of countries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

(5) It is the policy of the United States—

(A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;

(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and consultation with representatives of appropriate United States Government agencies and private industry.

(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.

(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.

(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

§ 2407. Foreign boycotts

(a) Prohibitions and exceptions

(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act [section 2402(5)(A) or (B) of this Appendix], the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulations:

> (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

(2) Regulations issued pursuant to paragraph (1) shall provide exceptions for—

(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests

for information regarding requirements of employment of such individual within the boycotting country; and

(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.

(3) Regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).

(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

(5) This section shall apply to any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade the provisions of this section as implemented by the regulations issued pursuant to this subsection, and such regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.

(b) Foreign policy controls

(1) In addition to the regulations issued pursuant to subsection (a) of this section, regulations issued under section 6 of this Act [section 2405 of this Appendix] shall implement the policies set forth in section 3(5) [section 2402(5) of this Appendix].

(2) Such regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or the taking of any other action referred to in section 3(5) [section 2402(5) of this Appendix] shall report that fact to the Secretary, together with such other information concerning such request as the Secretary may require for such action as the Secretary considers appropriate for carrying out the policies of that section. Such person shall also report to the Secretary whether such person intends to comply and whether such person has complied with such request. Any report filed pursuant to this paragraph shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any goods or technology to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary, considers appropriate for carrying out the policies set forth in section 3(5) of this Act [section 2402(5) of this Appendix].

(c) Preemption

The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains in participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

§ 2410. Violations

(a) In general

Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than 5 years, or both.

(b) Willful violations

(1) Whoever willfully exports anything contrary to any provision of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order, or license issued thereunder, with knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes—

(A) except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000, whichever is greater; and

(B) in the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 10 years, or both.

(2) Any person who is issued a validated license under this Act [sections 2401 to 2420 of this Appendix] for the export of any good or technology to a controlled country and who, with knowledge that such a good or technology is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense—

(A) except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000, whichever is greater; and

(B) in the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 5 years, or both.

For purposes of this paragraph, "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961 [22 U.S.C. 2370(f)].

(c) Civil penalties; administrative sanctions

(1) The head of any department or agency exercising any functions under this Act [sections 2401 to 2420 of this Appendix]. or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $10,000 for each violation of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix], either in addition to or in lieu of any other liability or penalty which may be imposed, except that the civil penalty for each such violation involving national security controls imposed under section 5 of this Act [section 2404 of this Appendix] or controls imposed on the export of defense articles and defense services under section 38 of the Arms Export Control Act [22 U.S.C. 2778] may not exceed $100,000.

(2)(A) The authority under this Act [sections 2401 to 2420 of this Appendix] to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix].

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act [sections 2401 to 2420 of this Appendix] for a violation of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix] may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of this Act [Section 2407(a) of this Appendix] shall be made available for public inspection and copying.

(d) Payment of penalties

The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed. In addition, the payment of any penalty imposed under subsection (c) may be deferred or suspended in whole or in part for a period of time no longer than any probation period (which may exceed one year) that may be imposed upon such person. Such deferral or suspension shall not operate as a bar to the collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

(e) Refunds

Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within 2 years after payment, on the ground of a material error of fact or law in the imposition of the penalty. Notwithstanding section 1346(a) of title 28, United States Code, no action for the refund of any such penalty may be maintained in any court.

(f) Actions for recovery of penalties

In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as

provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon by the United States in any way unless it has previously been reduced to judgement.

(g) Other authorities

Nothing in subsection (c), (d), or (f) limits—

(1) the availability of other administrative or judicial remedies with respect to violations of this Act [Sections 2401 to 2420 of the Appendix], or any regulation, order, or license issued under this Act [Sections 2401 to 2420 of this Appendix];

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act [Sections 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [Sections 2401 to 2420 of this Appendix]; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401 (b)).

APPENDIX H

Excerpts from the Export Administration Regulations, 15 C.F.R. § 369.2 (1983)

(d) *Furnishing information about business relationships with boycotted countries or blacklisted persons.*

PROHIBITION AGAINST FURNISHING INFORMATION ABOUT BUSINESS RELATIONSHIPS WITH BOYCOTTED COUNTRIES OR BLACKLISTED PERSONS

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships: (i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

(2) This prohibition shall apply:

(i) whether the information pertains to a business relationship involving a sale, purchase, or supply transaction; legal or commercial representation; shipping or other transportation transaction; insurance; investment; or any other type of business transaction or relationship; and

(ii) whether the information is directly or indirectly requested or is furnished on the initiative of the United States person.

(3) This prohibition does not apply to the furnishing of normal business information in a commercial context. Normal business information may relate to factors such as financial fitness, technical competence, or professional experience, and may be found in documents normally available to the public

such as annual reports, disclosure statements concerning securities, catalogues, promotional brochures, and trade and business handbooks. Such information may also appear in specifications or statements of experience and qualifications.

(4) Normal business information furnished in a commercial context does not cease to be such simply because the party soliciting the information may be a boycotting country or a national or resident thereof. If the information is of a type which is generally sought for a legitimate business purpose (such as determining financial fitness, technical competence, or professional experience), the information may be furnished even if the information could be used, or without the knowledge of the person supplying the information is intended to be used, for boycott purposes. However, no information about business relationships with blacklisted persons or boycotted countries, their residents or nationals, may be furnished in response to a boycott request, even if the information is publicly available. Requests for such information from a boycott office will be presumed to be boycott-based.

(5) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

EXAMPLES CONCERNING FURNISHING OF INFORMATION

The following examples are intended to give guidance in determining the circumstances in which the furnishing of information is prohibited. They are illustrative, not comprehensive.

(i) U.S. contractor A is considering bidding for a contract to build a dam in boycotting country Y. The invitation to bid, which appears in a trade journal, specifies that each bidder must state that he does not have any offices in boycotted country X. A knows or has reason to know that the requirement is boycott-based.

A may not make this statement, because it constitutes information about A's business relationships with X.

(ii) U.S. contractor A is considering bidding for a contract to construct a school in boycotting country Y. Each bidder is required to submit copies of its annual report with its bid. Since A's annual report describes A's worldwide operations, including the countries in which it does business, it necessarily discloses whether A has business relations with boycotted country X. A has no reason to know that its report is being sought for boycott purposes.

A, in furnishing its annual report, is supplying ordinary business information in a commercial context.

(iii) Same as (ii), except that accompanying the invitation to bid is a questionnaire from country Y's boycott office asking each bidder to supply a copy of its annual report.

A may not furnish the annual report despite its public availability, because it would be furnishing information in response to a questionnaire from a boycott office.

(iv) U.S. company A is on boycotting country Y's blacklist. For reasons unrelated to the boycott, A terminates its business relationships with boycotted country X. In exploring other marketing areas, A determines that boycotting country Y offers great potential. A is requested to complete a questionnaire from a central boycott office which inquires about A's business relations with X.

A may not furnish the information, because it is information about A's business relationships with a boycotted country.

(v) U.S. exporter A is seeking to sell its products to boycotting country Y. A is informed by Y that, as a condition of sale, A must certify that it has no salesmen in boycotted country X. A knows or has reason to know that the condition is boycott-based.

A may not furnish the certification, because it is information about A's business relationships in a boycotted country.

(vi) U.S. engineering company A receives an invitation to bid on the construction of a dam in boycotting country Y. As a condition of the bid, A is asked to certify that it does not have any offices in boycotted country X. A is also asked to furnish plans for other dams it has designed.

A may not certify that it has no office in X, because this is information about its business relationships in a boycotted country. A may submit plans for other dams it has designed, because this is furnishing normal business information, in a commercial context, relating to A's technical competence and professional experience.

(vii) U.S. company A, in seeking to expand its exports to boycotting country Y, sends a sales representative to Y for a one week trip. During a meeting in Y with trade association representatives, A's representative desires to explain that neither A nor any companies with which A deals has any business relationship with boycotted country X. The purpose of supplying such information is to ensure that A does not get blacklisted.

A's representative may not volunteer this information even though A, for reasons unrelated to the boyoctt, does not deal with X, because A's representative would be volunteering information about A's business relationships with X for boycott reasons.

(viii) U.S. company A is asked by boycotting country Y to furnish information concerning its business relationships with boycotted country X. A, knowing that Y is seeking the information for boycott purposes, refuses to furnish the information asked for directly, but proposes to respond by supplying a copy of its annual report which lists the countries with which A is presently doing business. A does not happen to be doing business with X.

A may not respond to Y's request by supplying its annual report, because A knows that it would be responding to a boycott-based request for information about its business relationships with X.

(ix) U.S. company A receives a letter from a central boycott office asking A to "clarify" A's operations in boycotted country X. A intends to continue its operations in X, but fears that not responding to the request will result in its being placed on boycotting country Y's blacklist. A knows or has reason to know that the information is sought for boycott reasons.

A may not respond to this request, because the information concerns its business relationships with a boycotted country.

(x) U.S. company A, in the course of negotiating a sale of its goods to a buyer in boycotting country Y, is asked to certify that its supplier is not on Y's blacklist.

A may not furnish the information about its supplier's blacklist status, because this is information about A's business relationships with another person who is believed to be restricted from having any business relationship with or in a boycotting country.

(xi) U.S. company A has a manufacturing plant in boycotted country X and is on boycotting country Y's blacklist. A is seeking to establish operations in Y, while expanding its operations in X. A applies to Y to be removed from Y's blacklist. A is asked, in response, to indicate whether it has manufacturing facilities in X.

A may not supply the requested information, because A would be furnishing information about its business relationships in a boycotted country.

(xii) U.S. bank A plans to open a branch office in boycotting country Y. In order to do so, A is required to furnish certain information about its business operations, including the location of its other branch offices. Such information is normally sought in other countries where A has opened a branch office, and A does not have reason to know that Y is seeking the information for boycott reasons.

A may furnish this information, even though in furnishing it, A would disclose information about its business relationships in a boycotted country, because it is being furnished in a normal business context and A does not have reason to know that it is sought for boycott reasons.

(xiii) U.S. architectural firm A responds to an invitation to submit designs for an office complex in boycotting country Y. The invitation states that all bidders must include information concerning similar types of buildings they have designed. A has not designed such buildings in boycotted country X. Clients frequently seek information of this type before engaging an architect.

A may furnish this information, because this is furnishing normal business information, in a commercial context, relating to A's technical competence and professional experience.

(xiv) U.S. oil company A distributes to potential customers promotional brochures and catalogues which give background information on A's past projects. A does not have business dealings with boycotted country X. The brochures, which are identical to those which A uses throughout the world, list those countries in which A does or has done business. In soliciting potential customers in boycotting country Y, A desires to distribute copies of its brochures.

A may do so, because this is furnishing normal business information, in a commercial context, relating to professional experience.

(xv) U.S. company A is interested in doing business with boycotting country Y. A wants to ask Y's Ministry of Trade whether, and if so why, A is on Y's blacklist or is otherwise restricted for boycott reasons from doing business with Y.

A may take this limited inquiry, because it does not constitute furnishing information.

(xvi) U.S. company A is asked by boycotting country Y to certify that it is not owned by subjects or nationals of boycotted country X and that it is not resident in boycotted country X.

A may not furnish the certification, because it is information about A's business relationships with or in a boycotted country, or with nationals of a boycotted country.

(xvii) U.S. company A, a manufacturer of certain patented products, desires to register its patents in boycotting country Y. A receives a power of attorney form required to register its patents. The form contains a question regarding A's business relationships with or in boycotted country X. A has no business relationships with X and knows or has reason to know that the information is sought for boycott reasons.

A may not answer the question, because A would be furnishing information about its business relationships with or in a boycotted country.

(xviii) U.S. company A is asked by boycotting country Y to certify that it is not the mother company, sister company, subsidiary, or branch of any blacklisted company, and that it is not in any way affiliated with any blacklisted company.

A may not furnish the certification, because it is information about whether A has a business relationship with another person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

APPENDIX I

Date 3.7.1978

M/s. TRANE INTERNATIONAL
3600 Pammel Creek Road
La Crosse, Wisconsin 54601 U.S.A.

Attn. Mr. M. Bouchard—Export Sales Manager.

Subject:—Ministry of communication letter
No. MMA/7558/S/1303/78, dated July 3, 1978.

Dear Sirs,

We have received the above reference letter and questionaire [sic] from Ministry of Communication, Customs department, requesting certain information and explanations. Attached please find the English translation to above letter, and attachment.

As you note from the letter, we should have the answer signed and legalised by the appropriate U.S. Authorities, and any Arab official representative office. Also your answer should be by Registered Air mail, and within a period of 3 weeks, to allow us time to submit same to Ministry of Communication.

Please treat as urgent.

Best Regards,
ABDULHAMID YOUSUF AL-ESSA.

MINISTRY OF COMMUNICATIONS
CUSTOMS DEPT.
ISRAEL BOYCOTT OFFICE
P.O.B. 1152—Kuwait

Date 3.7.1978.

TRANSLATION OF LETTER FROM MINISTRY OF COMMUNICATION

NO:MMA/7558/S/1303/78. *SUBJECT*:-THE AMERICAN COMPANY

Date: 25/JAMAOI/1398 HIJRI
1/JUNE/1978. *THE TRANE COMPANY*

M/s. Abdulhamid Yousuf Al-Essa
P.O. Box. 1350,
KUWAIT.

Dear Sirs,

We were informed by the Ministry of Electricity and Water, that you are the local distributors for the above mentioned American Company.

Please contact the above reference Company, and request them to submit a written explanation, to be legalised by the appropriate American authorities, and by any official Arab representative Office in U.S.A. whereby the Company will define its relations with Israel by answering the attached questionaire [sic], and its relations with the following American Companies.

- CHEMICAL PLANTS INTERNATIONAL INC.
- DELAVAL.
- DURAMETALLIC CORP.
- OLIN.
- CRAWFORD & RUSSEL INC.
- EROMAN SUPPLY CO.

Relations should be defined in view of following:

1) - Sharing in Capital

2) - Licencing [sic] for manufacturing.

3) - Licencing [sic] in name and Trade Marks.

4) - Technical assistance and expertise service.

5) - Any other relation, whatever the nature could be.

Date 3.7.1978

Your communication with the above reference Co., should be by Registered Air Mail, with confirmed receipt. The receipt should be sent to us as soon as received together with a copy of your letter to the Company.

Please note that we should receive the answer within a period of 3 months from the above date.

Thanking you,

Assistant Undersecretary

(Customs Affairs).

MINISTRY OF COMMUNICATIONS
CUSTOMS DEPT.
ISRAEL BOYCOTT OFFICE

P.O.B. 1152—KUWAIT

1—Do you have now or ever have had a branch or main company, factory or assembly plant in Israel?

2—Do you have now or ever have had general agencies or offices in Israel for your Middle Eastern or international operations?

3—Have you ever granted the right of using your name, trademarks or copyright or that of any of your subsidiaries to Israeli persons or firms?

4—Do you participate or own or ever have participated or owned shares in an Israeli firm or business?

5—Do you render now or ever have rendered any consultative service or technical assistance to any Israeli firm or business?

6—Do you represent now or ever have represented any Israeli firm or business in Israel or aboard?

7—What companies you are shareholders in their capital? State the name of each company and the percentage of share to *their* total capital.

8—What companies are shareholders in your capital? State the name of each company and the percentage of share to *your* total capital.

* N.B.— The above questions should be answered on behalf of the company itself & of all its branch companies, if any.

Nos. 83-1921 and 83-1957

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE TRANE COMPANY AND MAURICE BOUCHARD, PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

BRIGGS & STRATTON CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

NEIL H. KOSLOWE
Special Litigation Counsel

ROBERT LAVET
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether provisions of the Export Administration Act of 1979 and implementing regulations violate the First Amendment by prohibiting petitioners from providing Arab states engaged in a boycott of Israel with certain information about their business activities related to Israel.

2. Whether the regulations' definition of intent to further the boycott is consistent with the Act.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a)[1] is reported at 728 F.2d 915. The opinion of the district court in No. 83-1921 (Pet. App. 6a-27a) is reported at 552 F. Supp. 1378. The opinions of the district court in No. 83-1957 (Pet. App. 28a-52a) are reported at 539 F. Supp. 1307 and 544 F. Supp. 667.

[1] "Pet. App." refers to the appendix to the petition in No. 83-1921 unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984 (Pet. App. 53a-54a). A petition for rehearing was denied on March 26, 1984 (83-1957 Pet. App. A1). The petition for a writ of certiorari in No. 83-1921 was filed on May 24, 1984. The petition for a writ of certiorari in No. 83-1957 was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Export Administration Act of 1979 declares that "[i]t is the policy of the United States * * * to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States" and "to encourage and, in specified cases, require United States persons engaged in the export of goods or technology * * * to refuse to take actions, including furnishing information * * * which have the effect of furthering or supporting the restrictive trade practices or boycotts * * * imposed by any foreign country against a country friendly to the United States." 50 U.S.C. App. (Supp. V) 2402(5)(A) and (B).[2] The Act further provides that, "[f]or the purpose of implementing the[se] policies" (50 U.S.C. App. (Supp. V) 2407(a)(1)):

> The President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by

---

[2]The authority granted by the Export Administration Act of 1979 expired on March 30, 1984, but its prohibitions are still in force by virtue of Exec. Order No. 12470, 49 Fed. Reg. 13099 (1984).

a foreign country against a country which is friendly to the United States * * *:

* * * * *

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship * * * with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country.

The implementing regulations provide, in part (15 C.F.R. 369.2(d)):

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

2. The Arab boycott of Israel has been in effect for over 30 years. It has primary, secondary, and tertiary aspects. The primary boycott consists of a refusal by 16 Arab nations to deal with Israel. The secondary boycott is a refusal by 13 Arab states to deal with (and a prohibition against their residents' dealing with) persons or firms that,

although not Israeli, have been blacklisted because of their dealings with Israel. The tertiary boycott involves a refusal to deal with firms that deal with blacklisted firms. Pet. App. 58a-59a; 83-1957 Pet. App. A3-A4.

Petitioners are two United States corporations and one official of each of those corporations. They received questionnaires, from nations participating in the Arab boycott, demanding information concerning their business activities and relationships in Israel. It is undisputed that the Export Administration Act and its implementing regulations prohibit them from answering these questionnaires and that their refusal to answer increases the likelihood that they will be blacklisted by Arab states. Pet. App. 2a.

Petitioners in No. 83-1921 brought suit in the United States District Court for the Western District of Wisconsin; petitioners in No. 83-1957 brought suit in the United States District Court for the Eastern District of Wisconsin. All the petitioners asserted that the prohibition on furnishing information in response to the boycott questionnaires violates the Constitution; petitioners in No. 83-1957 also asserted that the regulations were not authorized by the statute. Both district courts ruled against petitioners (Pet. App. 6a-52a). The court of appeals consolidated the appeals and affirmed (*id.* at 1a-5a).

ARGUMENT

1. Petitioners' principal contention is that the prohibition against answering the questionnaires violates their rights under the First Amendment. In particular, petitioners contend that if they were to answer the questionnaires they would be engaging in speech that is entitled to full protection under the First Amendment, and that the Export Administration Act and its implementing regulations cannot be justified as a restriction on fully protected speech.

In our view, the activity in which petitioners propose to engage — responding to the questionnaries — should not be regarded as speech at all. If it is regarded as speech it plainly should be viewed as commercial speech, and the courts below were correct in concluding that the restrictions challenged by petitioners do not violate the First Amendment.

a. The Arab boycott of Israel is activity by foreign governments that Congress has specifically declared to be contrary to the interests of the United States. As all the courts below found (see Pet. App. 11a, 19a, 20a; compare *id.* at 2a with *id.* at 48a), petitioners would be directly contributing to the success of the boycott if they provided the information sought in the questionnaires. That is because the secondary and tertiary boycotts would be impossible if the participating states could not determine which firms conducted business with Israel or with other blacklisted organizations; therefore, to the extent it is more difficult and costly for the boycotting nations to obtain this information, they will be deterred from conducting the boycott. It is apparent — indeed, petitioners in No. 83-1921 stipulated (*id.* at 63a) — that it will be less costly for the boycotting nations to obtain the information if firms supply it on demand.

Moreover, if petitioners — who expect that the boycotting nations will find their answers to the questionnaires acceptable and will continue to deal with them (see Pet. App. 3a) — are free to respond to the questionnaires, petitioners' competitors will be placed under pressure to conform to the boycotting states' prohibitions against dealing with Israel or with blacklisted firms; otherwise the competitors would not be able to give "acceptable" answers. By contrast, if no American firm is permitted to furnish the information petitioners seek to provide, the boycotting states will find it more difficult to force American firms to

compete in attempting to satisfy the demands of the boycott. As Congress explained in the legislative history of the anti-boycott provisions of the Export Administration Act (S. Rep. 95-104, 95th Cong., 1st Sess. 25 (1977)):

> [T]he prohibition on furnishing information about who does and proposes to do business with a boycotted country or blacklisted person * * * [is] necessary to prevent a boycotting country from using U.S. persons to supply information necessary to boycott enforcement. Such information may very well be available through other sources, * * * [b]ut there is little justification for permitting U.S. persons to supply information when they know it is being sought for boycott enforcement purposes. To do so would be to sanction active complicity in boycott implementation.

There is no First Amendment right to aid or abet an unlawful scheme or a scheme that is contrary to the foreign policy of the United States. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language * * *." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Petitioners would, for example, have no First Amendment right to provide information that facilitated a price-fixing conspiracy. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978); *United States* v. *Container Corp.*, 393 U.S. 333 (1969). Indeed, "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 ([2d Cir.] 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers'

threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)." *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The supplying of the information petitioners seek to provide has been determined by Congress to further a scheme that is similarly inimical to important national interests. As the district court in No. 83-1957 explained, in an opinion adopted by the court of appeals (Pet. App. 46a; see *id.* at 2a):

> The claim to protected first amendment rights in the free flow of information seems out of place in the context of the instant suit. [Petitioners] do not challenge a statute that prohibits them from presenting the public with price and product information about the [products] that [they] produce[]; the statute is no bar to the free flow of business information to the purchasers of [petitioners'] products. * * * Instead the legislation is designed to interrupt the flow of information to those who conduct an economic boycott against a nation friendly to the United States, a boycott of which Congress does not approve. In this context the admonition to be cautious about a first amendment claim must be heeded.

b. If the answering of the questionnaires is viewed as speech, it must necessarily be regarded as commercial speech. It is undisputed that the information petitioners seek to furnish is information that will make them more attractive, as business partners, to the boycotting states, and that petitioners' sole purpose in furnishing the requested information would be to induce the boycotting states to continue to deal with them. See, *e.g.*, 83-1921 Pet. 10. "By describing * * * [their] qualifications, [petitioners'] sole purpose [would be] to encourage members of the [group

Arab states engaged in the boycott] to engage [them] for * * * profit." *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982). If petitioners were supplying information about a product for the sole purpose of inducing potential consumers to buy the product, they would undoubtedly be engaging only in commercial speech. See, *e.g., Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 6-8; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561-563 (1980). The fact that petitioners are seeking to "sell" not a product but their entire firms to the Arab states does not warrant a different result. As the court of appeals explained (Pet. App. 3a-5a):

> [Petitioners] concede that their desire to answer the questionnaires is motivated by economics: through this lawsuit, [petitioners] hope to avoid the disruption of trade relationships that depend on access to the Arab states * * *.
>
> * * * We do not understand [petitioners] to be arguing that they would be interested in answering the questionnaires if truthful answers would result in the imposition of economic sanctions. Rather, their interest is in maintaining their advantageous commercial relationships, and any interest in promoting truth is directly proportional to the economic result it would achieve.
>
> * * * * *
>
> * * * [Petitioners] are free to communicate their views about the relative merits of the Arabs' political decisions directly to the Arabs if they choose, so long as in doing so they do not furnish information about business relationships with boycotted countries or blacklisted persons in violation of the Act. However, [petitioners] do not seek to answer the questionnaire in order to influence the Arabs' decision to conduct or

> enforce a trade boycott with Israel. The Arabs' policy in conducting their boycott is irrelevant to [petitioners'] answers. They wish through their answers only to show that the boycott's sanctions should not be applied to them, because they have not violated its terms.
>
> * * * * *
>
> * * * [Petitioners'] proposed answers to boycott questionnaires would serve only to allow [petitioners] to continue to maintain commercial dealings with the Arab world. The government has traditionally regulated the area of international trade. Applying the common-sense distinction articulated in *Ohralik* [v. *Ohio State Bar Association, supra*], we hold that the [petitioners'] proposed communications are commercial speech.

If petitioners' activity is viewed as commercial speech, there is no doubt that the Export Administration Act and its implementing regulations are constitutional. The government "may * * * prohibit commercial speech related to illegal behavior." *Bolger,* slip op. 9, citing *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388 (1973). While the Arab boycott has not been explicitly declared illegal — presumably because it consists entirely of actions by foreign states — Congress has, as we noted, explicitly declared that it is contrary to the policy of the United States.[3]

Moreover, even if commercial speech is related to legal activity, it can be regulated if the regulation serves a substantial government interest and is no more extensive than is necessary to serve that interest. *Bolger,* slip op. 9; *Central Hudson,* 447 U.S. at 564-566. The courts below correctly

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[3]The government has a particularly strong interest in regulating speech that, like petitioners', is directly solely at foreign governments.

ruled that the prohibition at issue here satisfies that test (Pet. App. 48a; see *id.* at 2a). The government plainly has an important interest in ensuring that American firms are not enlisted in aid of a boycott directed at an ally. As we have noted, and as Congress itself found, the prohibition on supplying information directly serves that objective. Petitioners do not suggest any way in which the prohibition might be more narrowly tailored without permitting an exchange of information that will prove helpful to the boycotting states.

2. Petitioners in No. 83-1957 also contend that the definition of intent contained in the regulations is unauthorized by the anti-boycott provisions of the Export Administration Act. The Act prohibits the furnishing of information "with intent to comply with, further, or support [the] boycott" (50 U.S.C. App. (Supp. V) 2407(a)(1)). The regulations provide, in relevant part (15 C.F.R. 369.1(e) (emphasis added)):

> (3) Intent is a necessary element of any violation of this part. It is not sufficient that one take action that is specifically prohibited by this part. It is essential that one take such action with intent to comply with, further, or support an unsanctioned foreign boycott. Accordingly, a person who inadvertently, without boycott intent, takes a prohibited action, does not commit any violation of this part.
>
> (4) Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established.
>
> (5) Reason or purpose can be proved by circumstantial evidence. *For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he*

knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

(6) Actions will be deemed to be taken with intent to comply with an unsanctioned foreign boycott if the person taking such action knew that such action was required or requested for boycott reasons. On the other hand, the mere absence of a business relationship with a blacklisted person or with or in a boycotted country does not indicate the existence of the requisite intent.

(7) In seeking to determine whether the requisite intent exists, all available evidence will be examined.

As the courts below noted (Pet. App. 36a-37a; *id.* at 2a), these regulations are fully in accord with Congress's intent. Indeed, the legislative history reveals that Congress specifically considered the problem of boycott questionnaires and resolved it in a fashion that is consistent with the regulations (S. Rep. 95-104 at 39-40):

> The most common example of prohibited information in the present context is a boycott questionnaire designed to elicit information about dealings with the boycotted country or blacklisted persons. The boycott questionnaire typically has no legitimate business purpose. It is intended to establish categories of eligibility for dealings with the boycotting country based on the subject's dealings with third parties. This provision prohibits the supply of that information in such a context.

On the other hand, the same kind of information might be disclosed in an ordinary commercial context. For example, a general contractor or professional engineer or architect might be asked for purposes of obtaining a profile of his experience and qualifications to describe other projects in which he has been engaged. Such information might incidentally disclose whether that person has business relationships with the boycotted country or with blacklisted persons. Similarly, such ordinary commercial documents as a corporation's annual report might disclos[e] the presence or absence of business dealings with a boycotted country or with blacklisted persons. So long as the person supplying the information does not do so with intent to comply with, further, or support a boycott, no violation of the law would occur.

Intent to comply with a boycott could be presumed, subject to rebuttal, where from all the circumstances it is reasonably clear that the information is sought for boycott enforcement purposes. The questionnaire, which on its face, or in the circumstances in which it is supplied, is designed only to elicit information about whether one has dealings with blacklisted persons or boycotted countries presents the clearest case. On the other hand where the information is sought in a context which does not make it reasonably clear that the purpose is boycott related, no illegal intent should be presumed. In a specific case, all the facts and circumstances, including ordinary commercial practice, would govern.

Petitioners suggest (83-1957 Pet. 4) that they cannot have the requisite intent to further the boycott because their answers to the questionnaire will prompt the boycotting nations to continue to do business with them, thus "limit-[ing] the impact of the boycott" (*ibid.*). But it is clear from

the legislative history that Congress did not intend to permit firms to second-guess its judgment that supplying information in response to a boycott questionnaire like those in issue here furthers the boycott. On the other hand, petitioners' assertion that "the regulations presume the requisite statutory intent from the fact of furnishing information" (*id.* at 6) is obviously an incorrect description of what the regulations provide; the regulations specifically state that the nature of the request for information and the context in which the information is sought are relevant to the question of intent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

NEIL H. KOSLOWE
Special Litigation Counsel

ROBERT LAVET
Attorney

JULY 1984

DOJ-1984-07

No. 83-1921

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE TRANE COMPANY AND MAURICE BOUCHARD,
Petitioners,

v.

MALCOLM BALDRIGE, Secretary of the
United States Department of Commerce, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316

Attorneys for Petitioners

August 1984

TABLE OF AUTHORITIES

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

In their Brief in Opposition ("Opp. Brief"), respondents present two arguments which are not to be found in the opinions of the courts below. Petitioners submit this Brief in reply to those arguments.

I.

Respondents argue that responses to boycott-related questionnaires should not be regarded as speech and are wholly beyond the scope of First Amendment protection. *See* Opp. Brief at 5-7.

The argument is supported by none of the cases on which respondents rely. For First Amendment purposes, speech is

defined at least as broadly as it is in ordinary discourse. It encompasses all communication of thought by means of spoken or written words, as well as "symbolic speech." *Cf., e.g., Spence* v. *Washington,* 418 U.S. 405, 410 (1974); *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505-06 (1969). Responses to questionnaires fall within the realm of constitutionally protected speech.

The series of cases cited by respondents stand instead for the proposition that the government may prohibit speech incident to or in perpetration of unlawful activity. In each case, the government clearly had the power to prohibit the unlawful activity. Where the Court faced the question, it held that the fact that the unlawful activity was carried out partially by means of speech did not prevent the government from prohibiting it. In this case, on the contrary, the proposed speech has been prohibited even though it is unrelated to illegal conduct.

In two of the cases, the prohibition of speech was designed to prevent the perpetration of fraud by means of false or misleading statements. *See Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S 976 (1969).

In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617-18 (1969), the Court permitted the government to prohibit "a threat of retaliation based on misrepresentation and coercion," but expressly noted that the First Amendment protects speech in the context of a labor dispute that does not amount to an unfair labor practice. *See also Luxuray of New York* v. *NLRB,* 447 F.2d 112, 116 (2d Cir. 1971).

In three cases, the prohibited speech constituted a restraint of trade or commerce in violation of the Sherman Antitrust Act. *See National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978); *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969); *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921).

In *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949), the Court upheld an injunction against labor-union picketing in violation of a state antitrust statute, and specifically noted that "appellants were doing more than exercising a right

of free speech or press"; they rather "were exercising their economic power together with that of their allies . . . ." *Id.* at 503.

In a final case, the Court upheld state-bar disciplinary action for a lawyer's use of information "as bait" in in-person solicitation of accident victims in violation of the state bar's Code of Professional Responsibility. *See Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 458 (1978).

The underlying premise of all the cases cited by respondents is that speech is beyond the protection of the First Amendment when it is an integral part of non-speech conduct or activity which the government may constitutionally prohibit. None of these cases is relevant. The law and regulations challenged in this case are not designed to prohibit misleading information, and it is undisputed that petitioners' answers to the questionnaires would be truthful. No claim has been made that petitioners' answers would interfere with, restrain or coerce any one or that petitioners are conspiring or combining in restraint of trade or overreaching in the course of business solicitation.

Respondents attempt to show the relevance of the cases on which they rely by suggesting that the Arab boycott of Israel is an "unlawful scheme," "contrary to the policy of the United States," and that Congress has not explicitly declared it to be illegal "presumably because it consists entirely of actions by foreign states . . . ." *See* Opp. Brief at 6, 9.

Respondents are correct that the Arab boycott is not illegal under the law of the United States. They are incorrect, however, in the reasons for that. The United States has jurisdiction over an action of a foreign sovereign outside the United States when that action has a "direct" or "substantial" effect within the United States. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2); *Restatement, Foreign Relations Law of the United States (Revised)* § 402(1)(c) (Tent. Draft No. 2, 1981). The reason the United States has not declared the boycott illegal is that it could not do so without violating international law, for international law considers boycotts to be legal. *See Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845, 866 (2d Cir. 1962), *rev'd on other*

grounds, 376 U.S. 398 (1964); Muir, "The Boycott in International Law," 9 J. Int'l L. & Econ. 187, 202 (1974); Lauterpacht, "Boycott in International Relations," 14 Brit. Y. B. Int'l L. 125, 130, 139-40 (1933).

Any nation may choose, in the exercise of its sovereign rights, which foreigners it will allow to do business within its borders and on what terms and conditions such business may be conducted. A boycotting country has the right under international law to choose not to trade with, and to prohibit its nationals from trading with, foreign companies that deal with boycotted countries, with blacklisted companies, or with foreign companies that fail to respond to questionnaires. *See, e.g., Restatement (Second), Foreign Relations Law of the United States* §§ 17, 18, 30 (1965). The United States has not attempted to make such conduct unlawful; if it did, it would violate international law.

There is therefore an essential difference between this case and all the cases cited by respondents. In those cases the prohibited speech was an integral part of illegal activity. In this case Congress and the Department of Commerce have simply chosen to prohibit speech of which they disapprove.

II.

Respondents claim that "all the courts below found" that "petitioners would be directly contributing to the success of the boycott if they provided the information sought in the questionnaires." Opp. Brief at 5. In fact *none* of the courts below made precisely that finding. The passages cited by respondents all make the different point that answers to the questionnaries would allow Arab boycott officials to satisfy their need, if any, for the information without the inconvenience of consulting public sources. *See* Petition for a Writ of Certiorari, Appendix

("Pet. App.") at 11a. Moreover, the impact on the success of the boycott was not, in the courts' view, the principal governmental interest involved in the law and regulations. Rather, the courts found that the governmental interest, involving "delicate foreign policy questions," was to prevent American citizens from participating in "actions which are repugnant to American values and traditions." Pet. App. at 18a, 47a-48a. Respondents evidently find this reasoning so disreputable that they have studiously ignored it and thereby rejected the basis of decision of all of the courts below.

CONCLUSION

In their Brief in Opposition, respondents have concentrated on arguments not to be found in the decisions below, and have ignored the principal basis for those decisions. Respondents thus seem to indicate that they do not find the opinions of the courts below to be sound or satisfactory. That is further good reason why the Court should grant review of the issues raised here.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRICE M. CLAGETT
JOHN L. ELLICOTT
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5316

Attorneys for Petitioners

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